82-167

No.

Office - Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, ET AL.,
PETITIONERS

v.

VERNON WALLACE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether servicemen may sue their superior officers for damages for alleged constitutional violations incident to military service.

PARTIES TO THE PROCEEDING

The petitioners are Commander George C. Chappell, Lieutenant Commander Kenneth Viafore, Lieutenant Clarence Schultz, Lieutenant Barron Bianco, Lieutenant Kenneth Jordan, Engine Man Chief Richard McCannon, Internal Communications Chief David Lamser, and Mess Management Specialist Chief Lumberto Papa. The respondents are Vernon Wallace, Robert Lemons, Cornelius Hickey, James Richardson, and George Shannon.

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OCTOBER TERM, 1982

No.

COMMANDER GEORGE C. CHAPPELL, ET AL.,
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v.

VERNON WALLACE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Commander George C. Chappell, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-20a) is reported at 661 F.2d 729. The order of the district court (App. C, *infra*, 22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1981, and a petition for rehearing was denied on March 2, 1982 (App. B, *infra*, 21a).

On May 24, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including July 16, 1982, and on July 2, 1982, Justice Rehnquist further extended the time in which to file a petition for a writ of certiorari to and including July 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents, black enlisted men in the Navy serving on board the U.S.S. Decatur, brought this suit against petitioners, their superior officers on the Decatur, in 1978.[1] Respondents claimed that because of their race, petitioners "assigned them the least desirable duties, excluded them from training programs, [gave] them low performance evaluations, and punished them with unusual severity for minor transgressions" (App. A, *infra*, 2a). Respondents based their claims directly on the Constitution (*id.* at 2a n.1).[2] They sought $10 million in compensatory and punitive damages from petitioners, as well as declaratory and injunctive relief (E.D. 17).

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[1] Petitioner Chappell was the Commanding Officer of the Decatur; petitioner Schultz, the Engineering Officer; petitioner Viafore, the Executive Officer; petitioner Jordan, the Operations Officer; petitioner Bianco, the Supply Officer; petitioner McCannon, the Chief of the Engineering Department; petitioner Lamser, the Chief of the Electrical Division; and petitioner Papa, the Chief of the Supply Department. E.D. 3-4. ("E.D." refers to the Excerpt of Documents filed in the court of appeals.)

[2] Respondents' claims also rested on 42 U.S.C. (Supp. III) 1985(3), and the court of appeals ruled that its analysis of "reviewability" (see pages 3-4, *infra*) would govern Section 1985(3) claims as well as claims based directly on the Constitution (App. A, *infra*, 8a-9a n.5).

The United States District Court for the Southern District of California dismissed the complaint, ruling that respondents' damages action was barred by an "intra-service immunity" (App. C, *infra*, 22a). The district court also ruled that the actions of which respondents complained were "nonreviewable military decisions" and that respondents had failed to exhaust their administrative remedies (*ibid.*).

The court of appeals reversed (App. A, *infra*, 1a-20a). It noted at the outset (*id.* at 2a n.1) that respondents, in bringing a damages action directly under the Constitution, were relying on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). But the court of appeals merely stated that "*Bivens* has been extended to fifth amendment equal protection claims" (App. A, *infra*, 2a n.1, citing *Davis* v. *Passman*, 442 U.S. 228 (1979)) and did not address the question whether *Bivens* empowered the court to confer on servicemen an implied cause of action for damages against their superior officers.

Instead, the court of appeals discussed the "reviewability" of respondents' claims and whether petitioners were absolutely immune from damages liability for suits arising from their military duties. The court stated that the "reviewability" question—which it defined as "whether a court may review [the challenged] military decision[s] to determine whether a substantive wrong has been committed" (App. A, *infra*, 4a)—could "arise regardless of the identity of the defendant, *i.e.*, whether the defendant is the United States or an individual federal official, and regardless of whether the remedy sought is damages or some form of nonmonetary relief" (*ibid.*). The court of appeals then held that in order to be reviewable, a claim would have to allege the violation of

"a 'recognized' constitutional right" and "amount to more than a traditional state law claim" (*id.* at 10a); the court concluded that respondents' claims fulfilled this criterion (*id.* at 19a). Beyond that, the court held that the reviewability of military decisions would depend on four factors (*id.* at 7a; emphasis omitted):

> (1) The nature and strength of the plaintiff's claim * * *. (2) The potential injury to the plaintiff if review is refused. (3) The extent of interference with military functions[,] * * * [although] interference per se should not preclude review because some degree of interference will always exist. (4) The extent to which military discretion or expertise is involved.

The court of appeals derived these factors from *Mindes* v. *Seaman*, 453 F.2d 197, 201-202 (5th Cir. 1971), which was not a *Bivens* action but a suit by a serviceman seeking declaratory and injunctive relief in connection with an allegedly erroneous performance evaluation. See 453 F.2d at 198. The court of appeals ordered the district court, on remand, to balance the four *Mindes* factors in deciding whether respondents' claims were reviewable (App. A, *infra*, 20a).[3]

The court of appeals then considered "whether [petitioners] possess[] official immunity" (App. A, *infra*, 12a). Relying principally on *Butz* v. *Economou*, 438 U.S. 478 (1978), the court held that "except in unusual circumstances"—such as, possibly, when a suit challenged a military decision made in combat, or by an officer acting in a judicial or prose-

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[3] The court of appeals also held that respondents were required to exhaust their administrative remedies, but it overturned the district court's decision that they had not done so here and instructed the district court to reconsider the issue (App. A, *infra*, 3a n.2, 20a).

cutorial role—military officers would be accorded only a qualified, not an absolute, immunity from suit (App. A, *infra*, 14a, 16a-18a & n.10). The court acknowledged that absolute immunity would avoid the "threat to discipline" posed by military officers' potential monetary liability, but it considered this a "marginal benefit" insufficient to "offset the substantial policies opposing absolute immunity" (*id.* at 15a).

REASONS FOR GRANTING THE PETITION

The court of appeals—alone among the appellate courts that have considered the issue—has held that a serviceman may sue his superior officers for damages for alleged constitutional violations incident to military service. This unwarranted extension of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), presents a significant potential threat to military discipline. It is also inconsistent with this Court's recognition, in related contexts, that permitting a serviceman to hale his superiors into court and hold them accountable in damages crucially undermines the hierarchical relationships that are unique, and essential, to the military. Because the court of appeals has incorrectly resolved an issue of great practical importance to the armed services, review by this Court is warranted.

1. This Court held in *Bivens* that a person whose constitutional rights are violated by a federal official may, in some circumstances, seek damages from the official in federal court. But *Bivens* and subsequent cases have emphasized that a constitutional damages remedy will not be implied if there are " 'special factors counselling hesitation in the absence of affirmative action by Congress.' " 403 U.S. at 396, quoted in *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980); see *Nixon* v. *Fitzgerald*, No. 79-1738

(June 24, 1982), slip op. 22 n.37; *Davis* v. *Passman*, 442 U.S. 228, 245-247 (1979).

The "peculiar and special relationship of the soldier to his superiors" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)) is such a special factor. As this Court has remarked of the military context, "the right to command and the duty to obey ordinarily must go unquestioned" (*Brown* v. *Glines*, 444 U.S. 348, 357 (1980)). The court of appeals' approach—by allowing a serviceman to threaten his superior officers with personal damages liability, and to impose on them the burdens of litigation, for every real or imagined grievance—will undermine the command relationship, forcing officers to hesitate before ordering actions that military discipline requires, but that a serviceman might resent.[4]

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[4] For example, according to the complaint in this case, respondent Wallace was dissatisfied with his duty assignment (E.D. 5-6); respondent Lemons urged that his work load was excessive and that he should not have been fined $50 for leaving his work clothes in his work area instead of a locker (E.D. 8); respondent Hickey asserted that he was unjustly denied a recommendation for a promotion (E.D. 10-11); respondent Richardson alleged that a white serviceman with less experience was given greater training opportunities (E.D. 13); and respondent Shannon objected to, among other things, being ordered, together with other servicemen, to clean a stove with a toothbrush (E.D. 15). Respondents made the conclusory assertion that these actions by petitioners deprived them of their "rights under the Constitution and laws of the United States, including the right not to be discriminated against because of [their] race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy" (E.D. 6; see E.D. 9, 11, 13, 15). The suit was not joined by

For similar reasons, this Court has held, even in less compelling contexts, that the importance of avoiding judicial intrusion into the relationship between a serviceman and his superiors overcomes even an apparently strong presumption in favor of granting relief. The Federal Tort Claims Act, for example, permits tort suits against the United States in a wide range of cases, and contains no express exemption for the military. See 28 U.S.C. 1346(b) and 2671 *et seq.* But in *Feres* v. *United States*, 340 U.S. 135 (1950), the Court ruled that the FTCA does not permit servicemen to sue the United States for service-related injuries; the Court reached this conclusion despite several indications, which it acknowledged, that Congress intended to permit servicemen to recover against the United States. See *id.* at 138-139.

The "basis of *Feres* was the Court's concern with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting), quoting *United States* v. *Brown*, *supra*, 348 U.S. at 112. See *United States* v. *Muniz*, 374 U.S. 150, 162 (1963). The Court was specifically concerned that "[t]he trial [of such a claim] would * * * involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 673. These concerns are

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all the black servicemen on board the Decatur; several, including the ship's equal employment opportunity adviser, filed affidavits in the district court supporting petitioners. See E.D. 40-45.

vastly greater when a serviceman, instead of seeking damages from the United States, "hale[s] his superiors into court" as defendants and threatens them with massive personal liability. See *Carlson* v. *Green*, *supra*, 446 U.S. at 21 (threat of personal liability has a greater impact on officials' behavior than the possibility that the government will be held liable); *Owens* v. *City of Independence*, 445 U.S. 622, 653 n.37, 655-656 (1980) (same). If "the effect of [an FTCA] action upon military discipline" (*Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 673) justified the Court in finding an implied exception to the FTCA,[5] surely the court of appeals should have hesitated before granting respondents a personal damages remedy directly against their superior officers—especially when Congress has given no indication that it favors such a remedy.[6] See *Jaffee* v. *United States*, 663 F.2d 1226, 1235 (3d Cir. 1981) (en banc), cert. denied, No. 81-1346 (May 17, 1982) ("suits based on service injuries involve, as a general matter, 'special factors counseling hesitation' ").

2. As the court of appeals recognized (App. A, *infra*, 19a n.11), Congress has provided alternative remedies that servicemen such as respondents may invoke to redress their grievances. These remedies are significant for two related reasons. First, the

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[5] Congress has, however, endorsed the *Feres* principle. See, *e.g.*, H.R. Rep. No. 97-384 (Pt. I), 97th Cong., 1st Sess. 5 (1981).

[6] Indeed, Congress did not extend Title VII of the Civil Rights Act of 1964, which provides administrative and judicial remedies for racial discrimination in federal employment (see 42 U.S.C. 2000e-16), to the military. *Johnson* v. *Alexander*, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978).

Court has stated that it will not find an implied damages remedy for a constitutional violation if Congress has provided a substitute remedy that is equally effective. *Carlson* v. *Green*, *supra*, 446 U.S. at 18-19; see *Davis* v. *Passman*, *supra*, 442 U.S. at 245-247; *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, *supra*, 403 U.S. at 397. Second, the contrast between the remedies Congress has provided for aggrieved servicemen and the *Bivens* remedy granted by the court of appeals demonstrates the inappropriateness of the court's augmenting Congress' remedial design in this fashion. See *Rostker* v. *Goldberg*, 453 U.S. 57, 65, 68 (1981), quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) (Congress' power over military affairs is " 'broad and sweeping' " and courts "must be particularly careful not to substitute [their own] judgment of what is desirable for that of Congress").

By statute, any serviceman "who believes himself wronged by his commanding officer" has the right to invoke the review of an officer superior in rank to the commanding officer; the superior officer is authorized to "take proper measures for redressing the wrong complained of." 10 U.S.C. 938. To the extent respondents complain of discriminatory nonjudicial punishment, they may similarly seek relief by appealing up the chain of command. See 10 U.S.C. 815(e). Congress has also provided for the Board for the Correction of Naval Records, a forum in which respondents may challenge allegedly discriminatory performance evaluations or promotion decisions. See 10 U.S.C. 1552; 32 C.F.R. Part 723. Congress vested the Secretary of the Navy, acting through the Board, with plenary power to "correct an error or remove an injustice" (10 U.S.C. 1552(a)), and in appropriate cases the Board may issue orders leading

to retroactive promotions and back pay. See generally *Thornton* v. *Coffey*, 618 F.2d 686, 692 (10th Cir. 1980); *Knehans* v. *Alexander*, 566 F.2d 312, 315 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978).[7]

These remedies established by Congress, unlike the *Bivens* remedy inferred by the court of appeals, preserve the military chain of command. If officers act wrongfully toward servicemen, they are subject to discipline imposed by *their* military superiors. But in a *Bivens* action, servicemen would call their superiors to account. Courts and juries (see *Carlson* v. *Green*, *supra*, 446 U.S. at 22-23), acting at the behest of servicemen and enforcing the judicially-created *Bivens* remedy, would be able to determine the circumstances in which superior officers are subject to sanctions for their behavior toward those they command. In addition, courts and juries would determine the nature and amount of the sanctions; here, for example, respondents seek punitive damages (see *Carlson* v. *Green*, *supra*, 446 U.S. at 21-22).

Judgments about the measure of discipline to impose on a military officer for acting improperly toward a subordinate are principal examples of the " 'complex, subtle, and professional decisions as to the composition, training, * * * and control of a military force' " about which this Court has said, " '[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence.' " *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 65-66, quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). These judgments are properly made by the officials desig-

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[7] In addition, as the court of appeals noted, the Navy has established "comprehensive" internal equal opportunity procedures "for reporting incidents and processing complaints" of racial discrimination. App. A, *infra*, 19a n.11.

nated by Congress and the executive branch. But under the court of appeals' approach, courts and juries would make these judgments. See *Butz* v. *Economou*, 438 U.S. 478, 503 (1978), citing *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, *supra*, 403 U.S. at 409 (Harlan, J., concurring) (in deciding whether to infer a *Bivens* remedy, a court must consider "whether the courts are qualified to handle the types of questions raised by the plaintiff's claim").

The tensions inherent in military life make it particularly inadvisable to accord servicemen a judicially-created damages remedy against their superior officers. Because " 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise,' * * * the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975), quoting *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). And " 'the rights of men in the armed forces must perforce be conditioned to meet [these] overriding demands of discipline and duty * * *.' " *Parker* v. *Levy*, 417 U.S. 733, 744 (1974), quoting *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). In order to maintain this extraordinary discipline, commanding officers will necessarily and frequently make decisions that servicemen or civilians—perhaps unaccustomed to the military's "specialized society * * * [with] laws and traditions of its own" (*Parker* v. *Levy*, *supra*, 417 U.S. at 743)—may consider unjust.

If, in these circumstances, a commanding officer must constantly consider the possibility that he will be sued for damages, his ability to lead effectively—"the right to command in the officer, [and] the duty of obedience in the soldier" (*In re Grimley*, 137 U.S.

147, 153 (1890))—will be undermined. Moreover, courts administering a judicially-created remedy are not the proper forum for resolving the grievances that arise in such a context. As this Court explained in another case in which a serviceman challenged a military personnel decision he thought was unfair:

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.

Orloff v. *Willoughby*, 345 U.S. 83, 93-94 (1953).

3. The court of appeals did not take adequate account of these concerns. The court simply assumed that a *Bivens* action was available to respondents; at no point did it specifically consider whether the factors that counsel hesitation in the military context, or the alternative remedies available to servicemen, should preclude servicemen from seeking a *Bivens* remedy against military officials.[8]

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[8] In addition, the court of appeals appears to have assumed (see, *e.g.*, App. A, *infra*, 11a, 16a n.10) that a distinction can be drawn between military decisions related to preparation for combat and those decisions somehow unconnected to combat. But as this Court has explained, no such distinction can be applied:

> [R]estrictions necessary for the inculcation and maintenance of basic discipline and preparedness are as justified on a regular base in the United States * * * as on a training base * * * or a combat-ready installation in the Pacific * * *. Loyalty, morale, and discipline are essential

Instead, the court discussed whether petitioners would have a "nonreviewability" or an immunity defense. But the court of appeals' reviewability criteria do not differentiate between suits for declaratory and injunctive relief, on the one hand, and suits that threaten officials with personal damages liability, on the other. Indeed, the court made it clear that these criteria were to apply in the same way irrespective of the remedy; commenting on "the possibility that military operations will be disrupted [by suits like respondents'], and the possibility of courts usurping military functions that they lack the competence to perform," the court of appeals said simply: "Once a claim has been found reviewable, allowing a damages remedy would not exacerbate either the disruption or the usurpation" (App. A, *infra*, 16a n.9). For obvious reasons, however, the threat of a suit for personal damages will have a far more inhibiting effect on commanding officers than the possibility that their actions may be set aside if found invalid. The court of appeals' decision to apply one set of "reviewability" criteria to both categories of cases, therefore, is an inadequate treatment of the question whether servicemen should have a *Bivens* action against their superior officers.

The court of appeals' discussion of the immunity issue is also not an adequate response to the question whether *Bivens* actions by servicemen should be allowed. The court did not distinguish, in its discussion of military officials' immunity, between damages suits

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attributes of all military service. Combat service obviously requires them. And members of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster.

Brown v. *Glines*, *supra*, 444 U.S. at 356-357 n.14.

brought by servicemen and damages suits brought by civilians. But as we have explained, the reasons for not permitting a *serviceman* to bring a *Bivens* action against his superiors are particularly strong. The military's "special functions" (*Butz* v. *Economou*, *supra*, 438 U.S. at 507) are central to the protection of the national security (see *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 11 & nn.18, 19) and it is therefore particularly important to protect military officials "from undue interference with their duties and from potentially disabling threats of liability" so as to ensure "the unhesitating performance of functions vital to the national interest" (slip op. 5). Whatever the strength of these arguments in the context of suits by civilians challenging actions taken by military officers within the scope of their official duties, the policy considerations underlying the absolute immunity defense are compelling in the context of suits by servicemen.[9] Some courts have accordingly ruled—reaching the correct result, in our view—that an "intra-military immunity" bars servicemen's suits against their superior officers. See, *e.g.*, *Thornwell* v. *United States*, 471 F. Supp. 344, 347-348 (D.D.C. 1979); *Misko* v. *United States*, 453 F. Supp. 513, 515 (D.D.C. 1978), aff'd, 593 F.2d 1371 (D.C. Cir. 1979). See also *Hass* v. *United States*, 518 F.2d 1138, 1142-1143 (4th Cir. 1975); *Bailey* v. *DeQuevedo*, 375 F.2d 72 (3d Cir.), cert. denied, 389 U.S. 923 (1967). Whether the question is framed as one of immunity or of the appropriateness of a *Bivens* remedy, however, the court of appeals

[9] Consequently, this is not a case like *Carlson* v. *Green*, *supra*, or *Davis* v. *Passman*, *supra*, where the Court ruled that the special factors counseling hesitation were "coextensive" with the defendants' official immunity. 442 U.S. at 246; see 446 U.S. at 19.

erred by failing to recognize that respondents' suit should be precluded because it is a damages action brought by servicemen against their superiors.[10]

4. This appears to be the first case in which servicemen have been allowed to seek damages from military officials for alleged constitutional violations incident to military service. See, *e.g.*, *Jaffee* v. *United States*, *supra*; *Rotko* v. *Abrams*, 455 F.2d 992 (2d Cir. 1972), aff'g and adopting 338 F. Supp. 46, 48 (D. Conn. 1971); *Laswell* v. *Brown*, No. 81-1768 (8th Cir. July 21, 1982), slip op. 16; *Bailey* v. *DeQuevedo*, *supra*; *Sigler* v. *LeVan*, 485 F. Supp. 185, 189-192 (D. Md. 1980), appeal dismissed, Nos. 80-1160 and 80-1202 (4th Cir. Apr. 29, 1980); *Thornwell* v. *United States*, *supra*; *Misko* v. *United States*, *supra*; *Birdwell* v. *Schlesinger*, 403 F. Supp. 710, 718 (D. Colo. 1975); *Roach* v. *Shields*, 371 F. Supp. 1392, 1393 (E.D. Pa. 1974). See also *Calhoun* v. *United States*, 604 F.2d 647 (9th Cir. 1979), aff'g and adopting 475 F. Supp. 1, 4 (S.D. Cal. 1977), cert. denied, 444 U.S. 1078 (1980); *Hass* v. *United States*, *supra*; *Bailey* v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965). But see *Alvarez* v. *Wilson*, 431 F. Supp. 136 (N.D. Ill. 1977), appeal pending, No. 81-2696 (7th Cir.). The impact of the court of appeals' decision is therefore heightened because it is a departure from the uniform rule that military offi-

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[10] In our view, the proper analysis would distinguish between the question whether a *Bivens* remedy should be conferred on a party and the question whether the defendant official is immune from suit. See, *e.g.*, *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 5 n.10, 19 n.36; *Butz* v. *Economou*, *supra*, 438 U.S. at 486, 503. Since the Court has not suggested that the scope of an official's immunity depends on the identity of the plaintiff, an "intra-military immunity" would be another way to express the conclusion that servicemen do not have an implied damages remedy against their superiors.

cers may not be subject to personal damages suits by those they command. Of course, petitioners have not yet been found liable; but the court of appeals' decision leaves no doubt that in some circumstances officers may be held liable for damages in their personal capacities, and it is the "potentially disabling threat[] of liability" and litigation (*Harlow* v. *Fitzgerald*, *supra*, slip op. 5), not the recovery from particular defendants, "that [is] disruptive of discipline and the orderly conduct of military affairs" (*Henninger* v. *United States*, 473 F.2d 814, 816 (9th Cir. 1973)). See also *Nixon* v. *Fitzgerald*, *supra*, slip op. 20 n.32, quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).[11]

5. Finally, the Court has granted certiorari in *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981), cert. granted, No. 81-469 (June 28, 1982), which raises related issues. *Bush* is a *Bivens* action by a federal civilian employee against his supervisor for alleged injuries incident to his employment. The United

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[11] It also appears that servicemen are bringing damages actions against their superiors with increasing frequency. We know of 18 such suits pending, seven of which are in the Ninth Circuit. *Alvarez* v. *Wilson*, *supra*; *Jones* v. *Reagan*, No. 81-2918 (7th Cir.); *Elliott* v. *Secretary of the Army*, Nos. 82-5144 and 82-5145 (9th Cir.); *Poe* v. *Kuyk*, Nos. 81-4017 and 81-4018 (9th Cir.); *Todd* v. *Brown*, No. 77-0725 (D. Ariz.); *Ramsey* v. *Lehman*, No. 81-1706 (S.D. Cal.); *Martin* v. *Olmstead*, No. 80-2041-N (S.D. Cal.); *Turner* v. *United States*, No. CV 79-1972-ALS (C.D. Cal.); *Benvenuti* v. *Department of Defense*, No. 81-1803 (D.D.C.); *Bois* v. *United States*, No. 80-1030 (D.D.C.); *Ogden* v. *United States*, No. 82-C-2680 (N.D. Ill.); *Morrow* v. *United States*, No. 81-C-2479 (N.D. Ill.); *Trerice* v. *United States*, No. 81-71392 (E.D. Mich.); *Cender* v. *Johnson*, Nos. 80-180-Civ.-3, 81-40-Civ.-3 (E.D. N.C.); *Vasquez* v. *Maslowski*, No. 81-59-Civ.-3 (E.D.N.C.); *Tufts* v. *Bishop*, Civ. No. 80-1890 (D. Kan.); *Jacobs* v. *United States*, No. 80-108 (D. Ore.); *Graham* v. *Marsh*, No. 80-1321 (S.D. Tex.).

States Court of Appeals for the Fifth Circuit held that special factors deriving from the federal employment relationship, and the alternative civil service remedies available, made it inappropriate to infer a *Bivens* remedy in favor of the plaintiff. Because *Bush* presents an issue analogous to that involved here, there would be little point in the lower courts' conducting further proceedings in this case until *Bush* is decided.

At the same time, we stress that the issues in *Bush* v. *Lucas* are only analogous. Because of the special needs of military discipline, different concerns attend military suits and strongly counsel against allowing a serviceman to pursue a constitutional damages remedy against his superior officers. For this reason, we believe that, regardless of the outcome of *Bush*, this case warrants further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 79-3172

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON, and GEORGE SHANNON, PLAINTIFFS-APPELLANTS

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT BARRON BIANCO, LIEUTENANT KENNETH JORDAN, EMC RICHARD MCCANNON, ICC DAVID LAMSER, and MSC LUMBERTO PAPA, DEFENDANTS-APPELLEES

Argued and Submitted Dec. 6, 1979

Submission Vacated Aug. 19, 1980

Ordered Resubmitted Feb. 2, 1981

Decided Nov. 2, 1981

Rehearing and Rehearing En Banc
Denied March 2, 1982

Before GOODWIN, HUG, and FLETCHER, Circuit Judges.

FLETCHER, Circuit Judge:

This action was brought by several black Navy enlisted men claiming discrimination on the basis of

race. The complaint alleged that plaintiffs' superior officers had assigned them the least desirable duties, excluded them from training programs, given them low performance evaluations, and punished them with unusual severity for minor transgressions. It was further alleged that this discriminatory treatment would retard their present and future career development. Plaintiffs claimed violations of both the equal protection clause [1] and 42 U.S.C. § 1985(3) (1976). They sought money damages and declaratory and injunctive relief.

Defendants moved for dismissal or, alternatively, for summary judgment. The district court granted defendants' motion on three grounds: that internal military decisions were not reviewable, that defendants were immune from liability, and that plaintiffs had failed to exhaust their administrative remedies.[2]

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[1] The complaint refers only generally to constitutional violations. Because the allegations of racial discrimination are very specific, however, we construe the general reference to the Constitution as an equal protection claim based on fifth amendment due process, *see e.g., Vance* v. *Bradley*, 440 U.S. 93, 94 n.1, 99 S.Ct. 939, 941, 59 L.Ed.2d 171 (1979); *Buckley* v. *Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976).

Although the complaint might have been drafted with greater precision, it is apparent that the first claim advanced by each plaintiff is in the nature of a *Bivens* action. *See Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (aggrieved party may bring damages action against federal official based directly on violation of fourth amendment). *Bivens* has been extended to fifth amendment equal protection claims. *See Davis* v. *Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

[2] We cannot tell from the record whether the district court treated the defendants' motion as one for dismissal under Fed.R.Civ.P. 12(b)(6) or summary judgment under Fed.R.

Plaintiffs appeal.[3]

Civ.P. 56. The plaintiffs, in opposing the defendants' motion, submitted a memorandum of law accompanied by documents evidencing exhaustion of various military remedies. The defendants' reply memorandum disputed the adequacy of the administrative steps taken by the plaintiffs. Since matters outside the pleadings were apparently presented to and not excluded by the court, the defendants' motion should have been treated as one for summary judgment. Fed.R.Civ.P. 12(b).

There are indications in the record that the court did not treat the motion as one for summary judgment. First, although the defendants moved for either dismissal or summary judgment, both the order granting the motion and the corresponding judgment referred exclusively to the "motion to dismiss." Second, although the order stated that the court had "reviewed the pleadings herein [and] the motion and memoranda of points and authorities filed by the parties," the order made no reference to plaintiffs' documentary evidence. Third, the court did not allude to rule 56, mention summary judgment, or purport to find an absence of factual disputes.

We must conclude that the district court erred in dismissing for failure to exhaust administrative remedies. Dismissal on the pleadings would have been improper, for the complaint expressly alleges exhaustion of administrative remedies. Summary judgment would also have been improper, as the record reveals an apparent factual dispute as to whether the administrative remedies were fully pursued. On remand, the district court may invite the parties to submit additional evidence on this issue before passing on the summary judgment motion.

[3] Defendants moved to dismiss this appeal on the ground that the notice of appeal, filed 35 days after entry of final judgment, was untimely. Fed.R.App.P. 4(a)(1) establishes a 30-day period for filing notices of appeal in civil cases. An exception, however, allows 60 days when "the United States or an officer or agency thereof is a party." *Id.* Sitting en banc, this court held that the 60-day period governs the present appeal. *See Wallace* v. *Chappell*, 637 F.2d 1345 (9th

At the outset, we distinguish between the two substantive grounds for the district court's decision: nonreviewability and immunity. Nonreviewability, in the present context, involves the question of whether a court may review a military decision to determine whether a substantive wrong has been committed. This question can arise regardless of the identity of the defendant, *i.e.*, whether the defendant is the United States or an individual federal official, and regardless of whether the remedy sought is damages or some form of non-monetary relief.

The official immunity question, in contrast, arises only when an individual official is sued for damages. If the underlying substantive claims are reviewable, the issue becomes whether the official can be held liable for damages for claims arising out of military service and, if so, under what circumstances.

We are thus presented with two difficult questions: whether constitutional claims by military personnel against their superior officers are subject to judicial review and whether the officers enjoy immunity from liability for money damages in connection with such claims. Because we conclude that some military decisions are reviewable and may give rise to liability for damages, we remand to the district court for reconsideration.

I

REVIEWABILITY

We begin by noting numerous cases in which courts have reviewed internal military decisions. *See*,

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Cir. 1981) (en banc). The motion to dismiss the appeal was denied, and the case was resubmitted to this panel to address the merits. *Id.* at 1348.

e.g., *Brown* v. *Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (reviewing requirement that prior approval be obtained before circulating petition on base); *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 13 L.Ed. 1036 (1851) (reviewing damages claim by enlisted man against superior officer for assault and false imprisonment); *Tigue* v. *Swaim*, 585 F.2d 909 (8th Cir. 1978) (reviewing exclusion of plaintiff from program involving access to nuclear weapons); *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971) (reviewing claim for injunctive and declaratory relief to void erroneous evaluation report); *cf. Schlesinger* v. *Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) (reviewing equal protection challenge to discharge statute); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (reviewing decision by Adjutant General of Ohio National Guard to deploy Guard units on university campus); *Harmon* v. *Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958) (reviewing less than honorable discharge); *Denton* v. *Secretary of Air Force*, 483 F.2d. 21 (9th Cir. 1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 102 (1974) (reviewing honorable discharge).

In other cases, we have refused to review various military decisions. *See, e.g.*, *Schlanger* v. *United States*, 586 F.2d 667 (9th Cir. 1978), *cert. denied*, 441 U.S. 943, 99 S.Ct. 2161, 60 L.Ed.2d 1045 (1979); *Arnheiter* v. *Chafee*, 435 F.2d 691 (9th Cir. 1970); *Covington* v. *Anderson*, 487 F.2d 660 (9th Cir. 1973). Our cases do not, however, make clear which military decisions are reviewable and which are not. The task we face today is that of clarifying this difficult area of the law.

Any test governing the reviewability of claims arising incident to military service must reflect a careful

balancing of conflicting policy considerations. Militating in favor of review is the plaintiff's strong interest in obtaining adequate redress for harm caused by the unconstitutional conduct of a federal official. In addition, society as a whole has an interest in deterring federal officials from knowingly violating individuals' constitutional rights.

In the military context, however, several countervailing policy considerations are present. A member of the armed forces is at a disadvantage in litigation because he or she often lacks time, money, and the means to procure witnesses. *Cf. Feres* v. *United States*, 340 U.S. 135, 145, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950) (articulating rationales favoring immunity from damages). Litigation is potentially disruptive to military operations. *See United States* v. *Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 145, 99 L.Ed. 139 (1954); *Calhoun* v. *United States*, 475 F.Supp. 1, 3 (S.D. Cal. 1977), *aff'd*, 604 F.2d 647 (9th Cir. 1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1029, 62 L.Ed.2d 761 (1980). Permitting litigation can make it difficult to maintain discipline. *See, e.g.*, *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671-72, 97 S.Ct. 2054, 2057-2058, 52 L.Ed.2d 665 (1977); *Brown*, 348 U.S. at 112, 75 S.Ct. at 143 (1954); *Calhoun*, 475 F.Supp. at 3. Finally, the Supreme Court has voiced a general objection to judges "running the army," *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94, 73 S.Ct. 534, 539-540, 97 L.Ed. 842 (1953), the implication being either that judicial review might usurp a military function or that the courts lack the competence to weigh the factors that might enter into a military decision. Under the Constitution, regulation of military affairs is within the special province of Congress rather than the courts. U.S. Const. art. I, § 8, cl. 14.

The Fifth Circuit has given careful thought to the problem of reconciling certain of these competing policies. In *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971), the court identified several categories of internal military decisions that have been held reviewable and several categories that have not. *Id.* at 199-201. It then articulated a test, to be applied by the trial court, for ascertaining whether a particular military decision should be reviewed. *Id.* at 201-02.

The *Mindes* court held that an internal military decision is unreviewable unless the plaintiff alleges (a) a violation of the Constitution, a federal statute, or military regulations; and (b) exhaustion of available intraservice remedies. If the plaintiff meets both prerequisites, the trial court must weigh four factors to determine whether review should be granted:

(1) *The nature and strength of the plaintiff's claim.* The *Mindes* court recognized that constitutional claims ordinarily carry greater weight than those resting on a statutory or regulatory base, but acknowledged that, within the class of constitutional claims, the nature and strength of the claim can vary widely.

(2) *The potential injury to the plaintiff if review is refused.*

(3) *The extent of interference with military functions.* The court observed that interference per se should not preclude review because some degree of interference will always exist.

(4) *The extent to which military discretion or expertise is involved.*

In *Schlanger* v. *United States*, 586 F.2d 667, 671 (9th Cir. 1978), *cert. denied*, 441 U.S. 943, 99 S.Ct.

2161, 60 L.Ed.2d 1045 (1979), we affirmed a district court decision applying the *Mindes* test.[4] Without discussion, we then applied the *Mindes* test to find a military decision reviewable in *Glines* v. *Wade*, 586 F.2d 675, 678 n.4 (9th Cir. 1978), *rev'd on other grounds sub nom. Brown* v. *Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980). We agree that, at least when constitutional claims are asserted,[5] the *Mindes*

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[4] The district court in *Schlanger* had found the particular decision unreviewable. After determining that the district court had properly applied *Mindes*, this court added in dictum that the same result could be reached in "a simpler and perhaps sounder manner" by denying review of all military decisions involving duty assignments. *Id.* at 671-72. For the reasons given in the text, we prefer the *Mindes* approach as a test for reviewability, at least when recognized constitutional claims are alleged.

On two occasions prior to *Schlanger*, we similarly refused to review military decisions involving duty assignments. *See Covington* v. *Anderson*, 487 F.2d 660 (9th Cir. 1973); *Arnheiter* v. *Chafee*, 435 F.2d 691 (9th Cir. 1970). Insofar as those decisions suggest a per se rule that all military duty assignments are unreviewable, they have been superseded by *Brown* v. *Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980), where the Supreme Court in fact reviewed a military duty assignment, *see Glines* v. *Wade*, 586 F.2d 675, 677 (9th Cir. 1978).

Our conclusion that there is no per se rule precluding review of duty assignments is bolstered by *Mir* v. *Fosburg*, 646 F.2d 342 (9th Cir. 1980), decided several months after the Supreme Court decision in *Glines*. In *Mir*, the district court had dismissed a state law claim challenging a military duty assignment. We reversed and remanded for a determination of whether the plaintiff should be given leave to amend to allege a federal claim. Our remand order would have been futile if all military decisions involving duty assignments were unreviewable.

[5] We include within this category those statutory claims based on constitutional violations. Consequently, the test we

test is an appropriate means of deciding when military decisions are reviewable. With respect to such constitutional claims, however, we add a qualification that can be articulated only after describing the decision in *Calhoun* v. *United States*, 475 F.Supp. 1 (S.D. Cal.1977), *aff'd* 604 F.2d 647 (9th Cir. 1979) (adopting opinion of district court), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1029, 62 L.Ed.2d 761 (1980).

In *Calhoun*, the parents of a marine killed during training brought a wrongful death action against the United States and individual officers under the Federal Tort Claims Act. The parents also asserted numerous constitutional claims. The court held that the doctrine of *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) (Government not liable under FTCA for negligence claims arising out of military service), barred recovery, even for the alleged constitutional violations. This holding was based on a conclusion that the constitutional claims were "essentially a restatement of the cause of action in tort." 475 F.Supp. at 5. The court explained:

> Absent the deprivation of a *recognized* constitutional right, it would subvert the application of the Federal Tort Claims Act and its defined exceptions to allow a litigant to superimpose over

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announce today also governs plaintiffs' section 1985(3) claims, which are based on equal protection violations.

We express no view as to whether the *Mindes* test should govern federal nonconstitutional claims. *Cf. Brown* v. *Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (reviewing claim that regulation prohibiting circulation of unapproved petition on Air Force base violated both federal statute and first amendment, but not discussing test for reviewability); *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 13 L.Ed. 1036 (1851) (reviewing common law claims of assault, battery, and false imprisonment).

> that body of law extensions of constitutional rights which were never intended to apply in this context.

Id. (emphasis in original). We distill from *Calhoun* the principle that an allegation of wrongdoing does not assume constitutional dimensions simply because the plaintiff states that it does.

With respect to constitutional claims, therefore, our adoption of the *Mindes* test is limited to cases in which the plaintiff has alleged what the *Calhoun* court described as a "recognized" constitutional right. We do not mean by this term to eliminate from consideration those constitutional claims that have not yet been accepted by the courts. We mean only that the allegations must amount to more than a traditional state law claim.

The *Mindes* approach, as qualified, fairly accommodates the competing policy considerations discussed earlier. By limiting our holding to allegations of "recognized" constitutional violations, we hope to alleviate the understandable concern that a clever pleader can often transform the most innocuous state tort action into a claim of constitutional stature. *See, e.g., Everett* v. *United States*, 492 F.Supp. 318, 322 (S.D.Ohio 1980); *Schmid* v. *Rumsfeld*, 481 F.Supp. 19, 21 (N.D. Cal.1979); *Misko* v. *United States*, 453 F.Supp. 513, 515 (D.D.C.1978). *See also Calhoun*, 475 F.Supp. at 5.

The exhaustion requirement likewise furthers several purposes.[6] When the injured party obtains satis-

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[6] We need not delineate which intraservice remedies must be exhausted in all cases. The availability and usefulness of a particular remedy will vary with the branch of the armed forces involved and with the nature of the grievance. See footnote 11 for citation to the principal intraservice remedies.

faction through military channels, there will of course be no need for litigation. Even if the claimant's efforts prove unavailing, the initiation of an administrative complaint might encourage the defendant officers to cease their allegedly illegal activity, thus mitigating any harm that would otherwise accrue. Perhaps most important, exhaustion of administrative remedies enables the reviewing court to benefit from the views and factfinding of the military authorities. In this way, the exhaustion requirement helps to minimize the objections to reviewability based on judicial usurpation of military discretion and the need for military expertise.

The first two factors that must be balanced under the *Mindes* test—the nature of the plaintiff's interest and the potential injury to the plaintiff if review is withheld—ensure that the plaintiff's interest in redressing the deprivation of constitutional rights is automatically taken into account. The same factors also guarantee that the likelihood of deterring official misconduct will be greatest in those situations in which the interest served by such deterrence is greatest.

The third *Mindes* factor—the extent of interference with military functions—enables the trial court to consider at least three of the policies militating against reviewability: the avoidance of disruption, the potential adverse effect on discipline, and the logistic constraints on a soldier's capacity to defend a lawsuit. The fourth factor—the extent to which resolution of the claim requires military expertise—further reduces the possibility of judicial usurpation of military discretion.

We conclude that the *Mindes* test, as qualified above, provides an appropriate framework for deter-

mining which military decisions are reviewable and which are not.

II

IMMUNITY

If the trial court determines that a particular claim is nonreviewable, the immunity question becomes moot. If the court elects to review the claim, however, and the plaintiff seeks to recover money damages, the issue becomes whether the defendant possesses official immunity.

The district court held that military officials are absolutely immune from liability for money damages for acts committed incident to military service. For the reasons given below, we cannot agree.

In *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Supreme Court held that federal officials exercising discretion possess only a *qualified* immunity from liability for damages in *Bivens*-type [1] actions alleging constitutional violations. Qualified immunity insulates an official who acts reasonably and in good faith. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 1691-1692, 40 L.Ed. 2d 90 (1974). The Court created an exception, however, for cases in which absolute immunity "is essential for the conduct of the public business." 438 U.S. at 507, 98 S.Ct. at 2911. It recognized that some officials, such as judges, prosecutors, and their administrative agency counterparts, perform "special functions" requiring absolute immunity. *Id.* at 508-17, 98 S.Ct. at 2911-2916. The question presented here is

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[1] *See* note 1 *supra*. The Court in *Economou* was extending *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 1691-1692, 40 L.Ed.2d 90 (1974), which recognized only qualified immunity in section 1983 actions against state officials, to *Bivens*-type actions against federal officials.

under what circumstances, if any, a military officer comes within the *Economou* exception.

Defendants contend that *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) gives military officials absolute immunity. The plaintiffs in *Feres* sought money damages under the Federal Tort Claims Act for either personal injury or wrongful death allegedly caused by the negligence of military officials. Relying on the language of the FTCA, on related statutory provisions, and on the legislative history, the Court interpreted the FTCA not to authorize recovery of damages from the United States for injuries incurred incident to military service. *Id.* at 146, 71 S.Ct. at 159.

Defendants maintain that *Feres* applies to constitutional violations. We disagree. Even if *Feres* were applicable to intentional torts, a question which has not yet been answered, all that would follow is that the plaintiffs cannot recover under the FTCA. *Feres* says nothing about *Bivens*-type actions, which are based on constitutional violations.

We approach the absolute immunity question, then, with several considerations in mind. In *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 13 L.Ed. 1036 (1851), the Supreme Court allowed only qualified immunity from liability in connection with an internal military decision. More recently, in *Economou*, the Supreme Court held that in actions alleging constitutional violations, federal officials generally are entitled only to qualified immunity. The reference in *Economou* to *Dinsman*, 438 U.S. at 492-94, 98 S.Ct. at 2903-2904,[8] indicates that the fact that the consti-

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[8] The reference in *Economou* was actually to the Supreme Court's first opinion in *Dinsman*. *See Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89, 12 L.Ed. 618 (1849). In that first opinion,

tutional claim was incident to military service would not necessarily preclude recovery.

In deciding whether the present case merits creating an exception to those two holdings, we observe that the rationales favoring reviewability, discussed above, likewise favor allowing recovery of money damages. The plaintiff's interest in redressing a constitutional grievance can often be served only by an award of money damages, which will restore the plaintiff as nearly as possible to the position he or she would have occupied but for the violation. Although society's interest in deterring unconstitutional conduct is furthered in some cases by the prospect of injunctive or declaratory relief, the deterrent effect is enhanced by the possibility of personal liability for money damages. The question before us, however, is whether countervailing considerations justify absolute immunity in the military context.

Many of the reasons that have prompted the courts to apply absolute immunity to other officials have no precise analogue in the military context. Judges and their administrative agency counterparts, for example, enjoy absolute immunity primarily because the adjudication function requires an unusual degree of impartiality, which would be lost if judges were continually in fear of personal liability in issuing decisions. *See, e.g., Butz* v. *Economou*, 438 U.S. 478, 512, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978); *Pierson* v. *Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967); *Sellars* v. *Procunier*, 641 F.2d 1295, 1299, 1300 (9th Cir. 1981). In addi-

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the Court held that a seaman is liable if he inflicts injury out of malice, *id.* at 123, but ordered a new trial because the trial court had erroneously placed on the defendant the burden of showing genuine motives, *id.* at 132.

tion, judges' insulation from political influence, their use of precedent in resolving disputes, and the availability of appellate review have been thought to reduce the need for private damages actions. *See Economou*, 438 U.S. at 512, 98 S.Ct. at 2913; *Sellars*, 641 F.2d at 1300 n.9. *See also Imbler* v. *Pachtman*, 424 U.S. 409, 422-23, 96 S.Ct. 984, 991-992, 47 L.Ed.2d 128 (1976) (immunity of prosecutor based on considerations analogous to those supporting immunity of judge); *Beard* v. *Udall*, 648 F.2d 1264, 1270-71 (9th Cir. 1981) (same). These rationales do not apply to most routine military decisions made in a noncombat setting during peacetime.

Thus, unless some other consideration warrants a grant of absolute immunity to military officials, we must hold that only qualified immunity applies. We see two such possibilities. First, as we have discussed in connection with reviewability, the soldier is handicapped in defending a civil suit. The need for a strenuous defense might be accentuated if the soldier is potentially liable for money damages. Second, the threat to discipline might be aggravated by the threat of liability for money damages. On balance, however, although we recognize that a grant of absolute immunity might conceivably further those two rationales, the marginal benefit it provides in cases strong enough to survive the nonreviewability barrier does not in our view offset the substantial policies opposing absolute immunity.[9]

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[9] The rationales advanced by *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), construing the Federal Tort Claims Act to bar liability of the United States for certain actions incident to military service, either are inapplicable here or have already been considered. First, the *Feres* Court believed it unfair to subject members of the

We therefore hold that once a constitutional claim against a military official has been found reviewable, the official will generally enjoy only a qualified immunity for acts performed in good faith. We recognize, however, that the considerations favoring absolute immunity might be sufficiently strong to warrant exceptions to this rule in certain contexts.[10] We

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armed services to varying standards of liability depending on the law of the place where they are stationed. 340 U.S. at 142-43, 71 S.Ct. at 157-158. This "nonuniformity" rationale is inapplicable to claims based on the Constitution. Second, the *Feres* Court noted that the United States is liable under the FTCA in the same manner that a private individual would be liable under the circumstances. Because military activities lack private counterparts, the Court concluded that Congress could not have contemplated recovery for claims arising out of military service. *Id.* at 141-42, 71 S.Ct. at 156-157. This rationale, of course, is entirely inapplicable to constitutional claims. Third, the Court noted that alternative statutory compensation schemes are available for military personnel receiving physical injuries. *Id.* at 144, 71 S.Ct. at 158. No such statutory compensation is available here.

Similarly inapplicable are two of the rationales previously considered in the context of the reviewability question—the possibility that military operations will be disrupted, and the possibility of courts usurping military functions that they lack the competence to perform. Once a claim has been found reviewable, allowing a damages remedy would not exacerbate either the disruption or the usurpation. In each case, the principal disadvantage arises from the litigation itself.

[10] Possible exceptions, for example, might relate to military officials who perform functions analogous to those of judges and prosecutors. We note also that absolute immunity might attach when decisions are made in a combat setting. *Cf. Tigue* v. *Swaim*, 585 F.2d 909, 914 (8th Cir. 1978) (military officers sometimes enjoy absolute immunity even during peacetime, depending on functions performed and interests to be protected).

leave to future courts the task of articulating exceptions when the need arises.

We also note the availability of the summary judgment procedure for heading off a trial when there is no genuine issue as to bad faith. Although a summary judgment motion must be evaluated in the light most favorable to the party opposing the motion, *see Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); *Cermetek, Inc.* v. *Butler Avpak, Inc.*, 573 F.2d 1370, 1377 (9th Cir. 1978), any supporting and opposing affidavits submitted in connection with the motion must be based on personal knowledge, Fed.R.Civ.P. 56(e); *Cermetek*, 573 F.2d at 1376. Assertions based solely on information or belief are insufficient to withstand a motion for summary judgment. *Id.* at 1377; *cf. Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 831, 70 S.Ct. 894, 896, 94 L.Ed. 1312 (1950) (such assertions insufficient to *support* motion for summary judgment), *overruled on other grounds, Lear, Inc.* v. *Adkins*, 395 U.S. 653, 671, 89 S.Ct. 1902, 1911, 23 L.Ed.2d 610 (1969). In determining whether there are genuine issues of material fact for summary judgment purposes, we see nothing to prevent the trial court from considering one of the most important objectives of the summary judgment procedure: "the elimination of waste of the time and resources of both litigants and the courts in cases where a trial would be a useless formality." *Zweig* v. *Hearst Corp.*, 521 F.2d 1129, 1135-36 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975). This policy assumes special significance in the military context because of the threat posed by a damages action to military discipline and because of the incon-

venience suffered by a soldier in defending a civilian lawsuit.

III

SUMMARY AND APPLICATION

Our holding may be summarized as follows: If a complaint alleges a "recognized" constitutional claim based on injuries incident to military service, and alleges exhaustion of intraservice remedies, the trial court is to apply the four *Mindes* factors to determine whether the claim should be reviewed. If the claim is found reviewable, and the plaintiff is seeking money damages, military officials will have only qualified immunity except in unusual circumstances that we need not delineate here. When qualified immunity applies, the usual procedures for summary judgment are of course available. A court's ruling on summary judgment may reflect the strong policy against disruption of military functions.

A ruling barring judicial review or establishing absolute immunity is an extreme measure. In the present context, either type of rule would shield from responsibility even an official who knowingly and in bad faith violates an individual's constitutional rights. So drastic a ruling could be justified only by policy concerns of extraordinary magnitude. Our holding today recognizes that precisely such concerns frequently exist in the military context. When they do, nonreviewability or possibly absolute immunity will result. Even when they do not, the military officer will still be entitled to a qualified immunity for acts performed in good faith.

To adopt a per se rule of either nonreviewability or absolute immunity as to all injuries arising out of military service would open the door to a range of

unredressable wrongs bounded only by the limits of one's imagination. Conversely, too assertive a judicial role would potentially implicate many of the legitimate policy considerations examined in this opinion. The intermediate course we adopt today is designed to enable the district courts to balance the concerns discussed above under the circumstances of the cases before them.

In the present case, the plaintiffs allege racial discrimination in duty assignments, selection of personnel for training programs, performance evaluations, and level of punishment for minor offenses. Those allegations, if true, would constitute a denial of equal protection. Plaintiffs thus allege a "recognized" constitutional violation, rather than a traditional state law claim couched in constitutional rhetoric.

Plaintiffs have also alleged exhaustion of administrative remedies.[11] This being the case, the district

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[11] Two principal intraservice remedies are available here. The first, provided by 10 U.S.C. § 938 (1976), authorizes a complaint to any superior commissioned officer. Art. 138, in particular, provides:

> Complaints of Wrongs. Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint . . . .

Second, OPNAV Instructions 5354.1a (1978) (United States Navy Equal Opportunity Manual), prohibits racial, ethnic, cultural, or sexual bias in the administration of justice, work assignments, career planning, off-base housing and the like and establishes a comprehensive procedure for reporting incidents and processing complaints. As indicated earlier, *see* note 2 *supra*, the present state of the record does not permit summary judgment on exhaustion grounds. On remand the court is free to invite submission of further evidence on this issue.

court on remand must consider the four *Mindes* factors bearing on reviewability. The district court must exercise its discretion in balancing these factors, and we express no view as to what the outcome should be. If the claims are found reviewable, the defendants will possess qualified immunity from liability for money damages. The plaintiffs will of course have to demonstrate exhaustion of administrative remedies before actually going to trial. Summary judgment might be appropriate if the plaintiffs are unable to demonstrate exhaustion.

The judgment of the district court is reversed, and the case remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-3172

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON, and GEORGE SHANNON, PLAINTIFFS-APPELLANTS

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT BARRON BIANCO, LIEUTENANT KENNETH JORDAN, EMC RICHARD MCCANNON, ICC DAVID LAMSER, and MSC LUMBERTO PAPA, DEFENDANTS-APPELLEES

[Filed Mar. 2, 1982]

Before: GOODWIN, HUG, and FLETCHER, Circuit Judges.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-0579-N

VERNON WALLACE, EL AL., PLAINTIFFS

v.

COMMANDER GEORGE C. CHAPPELL, ET AL., DEFENDANTS

[Filed Jan. 30, 1979]

ORDER OF DISMISSAL

Defendants' motion to dismiss came on for hearing before the court on January 8, 1979. Having reviewed the pleadings herein, the motion and memoranda of points and authorities filed by the parties, and having heard the argument of counsel, it is the opinion of the court that the motion to dismiss should be granted on the following grounds:

1. That the actions complained of are nonreviewable military decisions;
2. That public policy compels that the defendants be entitled to intra-service immunity;
3. That the plaintiffs have failed to exhaust their administrative remedies.

Accordingly, defendants' motion to dismiss is granted without leave to amend.

DATED: January 29, 1979.

/s/ Leland C. Nielsen
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-0579-N

VERNON WALLACE, ET AL., PLAINTIFFS

v.

COMMANDER GEORGE C. CHAPPELL, ET AL.,
DEFENDANTS

[Filed Jan. 30, 1979]

JUDGMENT

Defendants' motion to dismiss came on for hearing before the court, Honorable Leland C. Nielsen, United States District Judge presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the complaint be dismissed.

DATED at San Diego, California this 30 of January, 1979.

/s/ Leland C. Nielsen
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 377066 1029

Office - Supreme Court, U.S.
FILED
DEC 20 1982
ALEXANDER L. STEVAS
CLERK

No. 82-167

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL,
ET AL., PETITIONERS

v.

VERNON WALLACE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed July 30, 1982
Certiorari Granted November 1, 1982

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RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1978		
8-24	1	Fld complt for declaratory judgment & damages, request & ord for serv of process by other than US Mars., issd summ to atty, (JS5)
10-11	2	Fld plft not of mot & mot for preliminary injunction not for 10-12-78 at 9 am t/w memo of P&A. & exhib.
10-12	3	Ent ord hrg pltf mot for P/Inj—denied. (N)
1-21	4	Fld stip for extension of time to ans or otherwise plead to 11-10-78 (N)
	5	Fld stip for extension of time to ans or otherwise respond to 11-22-78 (N)
11-22	6	Fld deft not of mot for 12-11-78 at 10:30 am, mot to dism or in the alternative for S/J t/w memo of P&A in supp of mot t/w exhib & proof of serv.
12-7	7	Fld stip for cont of mots hrg from 12-18-78 at 1-8-79 at 10:30 am (N)
12-26	8	Fld def supplemt affd to deft mot to dism or in the alternative for S/J t/w cert of serv.
1979		
1-2	9	Fld plft memo in oppo to deft mot to dism & for an ord granted S/J t/w exhib & decl of atty.
1-4	10	Fld deft reply memo in supp of deft mot to dism & or for S/J. t/w cert of serv.
1-8	11	Ent ord hrg deft mot to dism-mot granted; deft to prepare ord. (N)
1-30	12	Fld ord of dismissal that deft mot is granted w/out leave to amend. (N)
	13	Fld jgmt that complt be dism. (Ent 1-30-79) (JS6) (mld cys)
3-6	14	Fld NOTICE OF APPEAL as to jdgmt ent 1-30-79.
3-7	—	Mld notice for filing designation of record on appeal.
3-14	15	Fld Designation of Record on appeal. Mld cys
3-23	16	Fld defts designation of repts trans. t/w cert of serv. (Mld cys)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-0579-N
Filed: August 24, 1978

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON, AND GEORGE SHANNON, PLAINTIFFS,

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT BARRON BIANCO, LIEUTENANT KENNETH JORDAN, EMC RICHARD MCCANNON, ICC DAVID LAMSER, MSC LUMBERTO PAPA, DEFENDANTS.

COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON, GEORGE SHANNON complain of COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT KENNETH JORDON, LIEUTENANT BARRON BIANCO, EMC RICHARD McCANNON, ICC DAVID LAMSER, and MSC LUMBERTO PAPA and state:

JURISDICTION

1. This is a civil action against members of the United States Navy seeking damages, declaratory judgment, and

injunctive relief to redress deprivation by defendants of plaintiffs' rights, privileges and immunities secured by the Fifth Amendment to the United States Constitution including 42 U.S.C. 1985 as well as defendants' abuse of their authority, defendants' failure to follow regulation, and defendants' corrupt, and discriminatory acts toward the plaintiffs. The amount in controversy exceeds $10,000 exclusive of interests and costs. This court has jurisdiction of this action under 28 U.S.C. Sections 1331 and 1343. Venue is proper. 28 U.S.C. 1391.

NATURE OF THE ACTION

2. Plaintiffs are all Black Americans who enlisted in the United States Navy and are currently assigned to Weapons Department, Supply Department and Engineering Department aboard the U.S.S. Decatur (DDG 31). The command of the U.S.S. Decatur is made up essentially of the defendants who are all Anglo-American or white officers. The plaintiffs are being discriminated against in their job assignments, in the schools they can attend, in the treatment at Non-Judicial Punishment, in their quarterly marks and in the skilled rates because they are Black.

Defendants committed the acts against the plaintiffs in violation of their civil rights in an effort to keep plaintiffs in the unskilled ratings in the U.S. Navy, in the most dangerous and dirtiest assignments, in the most unpleasant surroundings, out of schools where it is possible to advance, out of the advanced rates and in a condition of servitude and dependency. Plaintiffs are also discriminated against at Captains Masts and in evaluations. As a result of defendants' malicious and discriminatory acts, plaintiffs will not be able to develop a career in the Navy and will suffer once they are discharged. Plaintiffs seek money damages from defendants, a declaratory action stating their rights, and injunctive relief against continued discrimination.

PARTIES

3. Plaintiff VERNON WALLACE is a Black American stationed in First (Deck) Division, Weapons Department

aboard the U.S.S. Decatur. He enlisted in the U.S. Navy on August 13, 1976 and is currently a Seaman (E3). He was born and raised n San Antonio, Texas.

4. RICHARD LEMONS, is a Black American who was born and raised in San Antonio, Texas. He is an Electrician Third Class and is currently stationed in Engineering Department aboard the U.S.S. Decatur. He enlisted in the U.S. Navy on August 29, 1975.

5. CORNELIUS HICKEY is a Black American who was born and raised in Rockville Center, New York. He is a Messman and is a member of the Supply Department of the U.S. Decatur. He enlisted in the U.S. Navy on February 17, 1977.

6. JAMES RICHARDSON is also a Black American who was born and raised in Memphis, Tennessee. He is a Messman Third Class and is a member of the Supply Department of the U.S.S. Decatur. He enlisted in the U.S. Navy on August 28, 1975.

6a. GEORGE SHANNON is also a Black American. He is a Messman aboard the U.S.S. Decatur. He enlisted in the United States Navy on January 16, 1975.

7. Defendant COMMANDER GEORGE C. CHAPPELL, an Anglo-American, is an officer in the United States Navy, and was at all times relevant to the matters in this Complaint, the Commanding Officer of the U.S.S. Decatur. COMMANDER CHAPPELL was directly responsible for the acts and ommissions complained of by one or more of the plaintiffs herein.

8. Defendant LIEUTENANT CLARENCE SCHULTZ, an Anglo-American, is an officer in the United States Navy, and was at all times relevant to the matters in this Complaint, the Engineering Officer of the U.S.S. Decatur. LIEUTENANT SCHULTZ was directly responsible for the acts and ommissions complained of by one or more of the plaintiffs herein.

9. Defendant LIEUTENANT COMMANDER KENNETH VIAFORE, an Anglo-American, is an officer in the United States Navy, and was at all times relevant to the matters in this Complaint, the Executive Officer of the U.S.S. Decatur. LIEUTENANT COMMANDER VIA-

FORE was directly responsible for the acts and omissions complained of by one or more of the plaintiffs herein.

10. Defendant LIEUTENANT KENNETH JORDON, an Anglo-American, is an officer in the United States Navy, and was at all times relevant to the matters in this Complaint, the Operations Officer of the U.S.S. Decatur. LIEUTENANT JORDON was directly responsible for acts and ommissions complained of by one or more of the plaintiffs herein.

11. Defendant LIEUTENANT BARRON BIANCO, an Anglo-American, is an officer in the United States Navy, and was at all times relevant to the matters in this Complaint, the Supply Officer of the U.S.S. Decatur. LIEUTENANT BIANCO was directly responsible for the acts and ommissions complained of by one or more of the plaintiffs herein.

12. EMC RICHARD McCANNON is an Anglo-American non-commisioned officer in the United States Navy and at all times relevant to the matters in the Complaint, one of the chiefs in E Division, Engineering Department, aboard the U.S.S. Decatur. EMC McCANNON was directly responsible for the acts and ommissions complained of by one or more of the plaintiffs herein.

13. IC DAVID LAMSER is an Anglo-American non-commisioned officer in the United States Navy and at all times relevant to the matters in the Complaint, the head of Electrical Division. ICC LAMSER was directly responsible for the acts and omissions complained of by one or more of the plaintiffs herein.

14. MSC LUMBERTO PAPA is Filipano-American non-commissioned officer in the United States Navy and at all times relevant to the matters in the Complaint, a chief in the Supply Department aboard the U.S.S. Decatur. MSC PAPA was directly responsible for the acts and omissions complained of by one or more of the plaintiffs herein.

FIRST CLAIM OF PLAINTIFF WALLACE

15. On or about December 9, 1976, plaintiff WALLACE was transferred to U.S.S. Decatur, First Division, as a Seaman Apprentice.

16. On or about October 15, 1977, plaintiff WALLACE completed the courses for Operations Specialists and was transferred to Operations Intelligence (OI) Division, Operations Department, as a striker for Operations Specialist Third Class (E-4).

17. Plaintiff WALLACE performed the requirements, completed the courses and appeared before the Professional Development Board on or about July 18, 1978. The board was made up of five chief petty officers. This Board recommended that WALLACE remain in OI Devision.,

18. On or about July 21, 1978, the OI Division Officer, Lieutenant W.J. Bloss, recommended that WALLACE be designated as a striker for Operations Specialist and remain in OI Division.

19. On or about July 24, 1978, defendant JORDON recommended that WALLACE not be designated as a striker for Operations Specialist because of the ostensible reason that he does not possess the capability to ever qualify as an Operations Specialist or the desire to exhibit sustained effort.

20. On or about July 24, 1978, defendant CHAPPELL disapproved WALLACE's request to strike for Operations Specialist and transferred WALLACE to First Division.

22. On or about August 4, 1978, Plaintiff WALLACE requested to be transferred to OI Division. It was denied.

23. All Naval Commands are required to maintain an equal opportunity program for their personnal pursuant to naval regulations (OPNAV Instruction 5354.1a, March 8, 1978). Pursuant to that regulation it is stated:

> "It is the policy of the Navy to ensure equality of opportunity and treatment for all military members and civilian employees of the Deartment of the Navy regardless of race, creed, color, sex or national origin.... Discrimination resulting in the denial of equal opportunity to any individual will not be tolerated in the Navy."
>
> OPNAV Instruction 5354.1A (Op-01P)

Chapter II, Section 7 of the program provides that there shall be equality of opportunity in training and advancement and affirmative action to provide non-rated personnel

with opportunity to strike for ratings commensurate with demonstrated ability and desire.

24. The OI Division is manned by mostly Anglo-Americans and does not contain any Black Americans.

25. The actions of defendants CHAPPELL, VIAFORE, and JORDON in removing plaintiff WALLACE and denying his request to return was primarily because of the fact that plaintiff WALLACE is a Black American.

26. Defendants CHAPPELL, VIAFORE and JORDON abused their discretion, exceeded their legal authority, failed to follow and willfully and maliciously disregarded Navy regulations in denying plaintiff WALLACE's right to remain in OI Division.

27. The conduct of defendants described above deprived plaintiff WALLACE of his rights under the Constitution and laws of the United States, including the right not to be discriminated against because of his race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy.

28. As a direct result of defendants CHAPPELL, VIAFORE and JORDON's willful, malicious and unlawful actions and ommissions plaintiff WALLACE was subjected to emotional and mental stress because of the discriminatory practices.

29. As a direct result of defendants CHAPPELL, VIAFORE and JORDON's discriminatory actions, plaintiff WALLACE was removed from the possibility of acquiring a skilled rating and he will suffer loss and destruction of his naval career, loss upon discharge from naval service, and will suffer irreparable harm.

30. As a direct result plaintiff WALLACE has suffered damages in the amount of five hundred thousand dollars compensatory damages and five hundred thousand dollars punitive damages.

WHEREFORE, plaintiff WALLACE prays for judgment against defendants CHAPPELL, VIAFORE and

JORDON as listed above, plus reasonable attorney's fees and the cost of this action.

SECOND CLAIM OF PLAINTIFF WALLACE

31.-46. Plaintiff WALLACE adopts paragraphs 15 through 29 as paragraphs 31 through 46.

47. Defendants CHAPPELL, VIAFORE, and JORDON conspired to deprive plaintiff WALLACE of his rights under the Constitution and laws of the United States in violation of 42 U.S.C. Section 1985.

48. As a direct result plaintiff WALLACE has suffered compensatory damage in the amount of five hundred thousand dollars and punitive damages in the amount of five hundred thousand dollars.

WHEREFORE, plaintiff prays for a judgment against the defendants CHAPPELL, VIAFORE and JORDON as listed above, plus attorney's fees and costs of this action.

FIRST CLAIM OF PLAINTIFF LEMONS

49. On or about November 5, 1977 Plaintiff ROBERT LEMONS was transferred to the U.S.S. Decatur, Engineering Department, as an electrician third class.

50. During the period from December, 1977 to August, 1978, plaintiff LEMONS was assigned to perform three tasks (issue tools, order parts, and act as a career counselor) by defendants SCHULTZ, McCANNON and LAMSER. Due to the magnitude of these jobs it was impossible to complete all of them on a daily basis., Plaintiff LEMONS would constantly complain to defendants SCHULTZ, McCANNON and LAMSER about this.

51. During the same period plaintiff LEMONS was constantly being assigned numerous tasks by defendants McCANNON and LAMSER. This is true even though there were numerous enlisted personnel who were not assigned tasks when they completed their old task but many of the tasks were instead assigned to plaintiff LEMONS. Plaintiff LEMONS would complain to defendants SCHULTZ, McCANNON and LAMSER about this and the inability to complete all of the assignments.

52. Plaintiff LEMONS was sent to Captain's Mast in July, 1978 pursuant to 10 U.S.C. 815 for violation of 10 U.S.C. 982. Plaintiff LEMONS had his clothes in his work space because the keys to his locker had been misplaced. At the Captain's Mast plaintiff LEMONS was convicted and awarded a fifty dollar fine.

On or about the same time, Robert Knott, an Anglo-American enlisted was sent to Captain's Mast for a seven day unauthorized absence. All of the punishment was suspended. Plaintiff LEMONS protested this.

53. As a result of the three above mentioned actions and complaints, defendants McCANNON, LAMSER, VIAFORE and SCHULTZ have prepared an evaluation recommending that plaintiff LEMONS' quarterly marks be lowered to an average of 3.0 and that he not be recommended for advancement. For the same period Robert Knott's quarterly marks were 3.8.

54. As a result, plaintiff LEMONS will not be allowed to take the examination for second class to be held in September, 1978. Plaintiff LEMONS will suffer irreparable harm because his chance to advance will be denied and his career in the Navy will be jeopardized and he will also suffer loss when discharged.

55. OPNAV Instruction 5354.1a, Chapter II, Section 5 (Equal Opportunity in Military Justice) mandates that there be equality of justice and treatment for minority personnel and non-military personnel and that racial, ethnic, cultural or sexual basis not be factors. Section 7, of the same instruction requires that duty assignments be rotated on an equal basis.

56. The conduct of defendants described above deprived plaintiff LEMONS of his rights under the Constitution and laws of the United States, including the right not be discriminated against because of his race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy.

57. As a direct result of defendants SCHULTZ, McCANNON, VIAFORE and LAMSER's willful, malicious and unlawful actions and omissions plaintiff LEMONS was subjected to emotional and mental stress because of the discriminatory practices.

58. As a direct result of VIAFORE, SCHULTZ, McCANNON, and LAMSER's discriminatory actions, plaintiff LEMONS was removed from the possibility of advancement and he will suffer loss and destruction of his naval career, loss upon discharge from naval service, and will suffer irreparable harm.

59. As a direct result plaintiff LEMONS has suffered damages in the amount of five hundred thousand dollars compensatory damages and five hundred thousand dollars punitive damages.

WHEREFORE, plaintiff LEMONS prays for judgment against defendants VIAFORE, SCHULTZ, McCANNON and LAMSER as listed above, plus reasonable attorney's fees and the cost of this action.

SECOND CLAIM OF PLAINTIFF LEMONS

60.-69. Plaintiff LEMONS adopts paragraphs 49 through 58 as paragraphs 60 to 69.

70. Defendants VIAFORE, SCHULTZ, McCANNON and LAMSER conspired to deprive plaintiff LEMONS of his rights under the Constitution and laws of the United States in violation of 42 U.S.C. Section 1985.

71. As a direct result plaintiff LEMONS has suffered compensatory damage in the amount of five hundred thousand dollars, and punitive damages in the amount of five hundred thousand dollars.

WHEREFORE, plaintiff prays for a judgment against the defendants VIAFORE, SCHULTZ, McCANNON and LAMSER as listed above, plus attorney's fees and costs of this action.

FIRST CLAIM OF PLAINTIFF HICKEY

72. On or about July 10, 1977, Plaintiff HICKEY was transferred to the U.S.S. Decatur, Supply Department.

73. Since that time Plaintiff HICKEY has worked as a messman in the galley aboard the U.S.S. Decatur, Supply Department. experience and schooling than SN Wolf, an Anglo-American and SN Aguon, a Hawaiian-American. Defendants PAP and BIANCO recommended Wolf and Aguon for positions as petty officers (Messman Third Class) and refused to recommend Plaintiff HICKEY in July, 1978.

74. Defendants CHAPPELL, VIAFORE, BIANCO and PAPA never notified HICKEY that a schooling for records clerk and a position as records cherk in Supply Department U.S.S. Decatur, would be opening in July, 1978. Instead, two Anglo-Americans, SN Wolf and MS3 Anderson were sent to records school and recommended for the position as records clerk. Plaintiff HICKEY complained of these actions to the defendants.

75. Plaintiff HICKEY asked MSC PAPA to be sent to record school. MSC PAPA told HICKEY he did not have enough time in the galley. Instead, SN Wolf was sent to the records school when he had less time in the galley than HICKEY.

76. OPNAV Instruction 5354.1a, Chapter II, Section 7 provides that programs for advancement in rate be available to all personnel regardless of racial, ethnic, cultural or sexual background. Section 8 requires equal rotation of all work assignments regardless of race or ethnic background.

77. The conduct of defendants described above deprived plaintiff HICKEY of his rights under the Constitution and laws of United States, including the right not to be discriminated against because of his race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy.

78. As a direct result of defendants CHAPPELL, VIAFORE, BIANCO and PAPA's willful, malicious and unlawful actions and omissions, plaintiff HICKEY was subjected to emotional and mental stress because of the discriminatory practices.

79. As a direct result of defendants CHAPPELL, VIAFORE, PAPA and BIANCO's discriminatory actions, plaintiff HICKEY was removed from the possibility of acquiring an advanced rating and rotation of positions for skilled rating and he will suffer loss and destruction of his naval career, loss upon discharge from naval service, and will suffer irreparable harm.

80. As a direct result plaintiff HICKEY has suffered damages in the amount of five hundred thousand dollars compensatory damages and five hundred thousand dollars punitive damages.

WHEREFORE, plaintiff HICKEY prays for judgment against defendants CHAPPELL, VIAFORE, BIANCO and PAPA as listed above, plus reasonable attorney's fees and the cost of this action.

SECOND CLAIM OF PLAINTIFF HICKEY

81.-88. Plaintiff HICKEY adopts paragraphs 72 to 79 above as paragraphs 81 through 88.

89. Defendants CHAPPELL, VIAFORE, BIANCO and PAPA conspired to deprive plaintiff HICKEY of his rights under the Constitution and laws of the United States in violation of 42 U.S.C. section 1985.

90. As a direct result plaintiff HICKEY has suffered compensatory damages in the amount of five hundred thousand dollars and punitive damages in the amount of five hundred thousand dollars.

WHEREFORE, plaintiff prays for a judgment against the defendants CHAPPELL, VIAFORE, BIANCO and PAPA as listed above, plus attorney's fees and costs of this action.

FIRST CLAIM OF PLAINTIFF RICHARDSON

91. On or about November 7, 1977, plaintiff RICHARDSON was transferred to U.S.S. Decatur, Supply Department, as a Messman Third Class.

92. Since that time plaintiff RICHARDSON has worked as a Messman in the galley aboard the U.S.S. Decatur.

93. Plaintiff RICHARDSON was told by defendant PAPA that a position as a record clerk and the record school position were available in July 1978 in Supply Department on the U.S.S. Decatur, and that he would be sent to records school and recommended for the position as records clerk. Instead, MS Anderson and SN Wolf, two Anglo-Americans, were sent to records school by defendants.

94. Plaintiff RICHARDSON was told that he would not be sent to records school or recommended as the records clerk on or about August 1, 1978. SN Wolf was sent to records school even though he has less time in the galley aboard the U.S.S. Decatur than Plaintiff RICHARDSON.

95. OPNAV Instruction 5354.1a, Chapter II, Section 7 provides that programs for advancement in rate be available to all personnel regardless of racial, ethnic, cultural or sexual background. Section 8 requires equal rotation of all work assignments regardless of race or ethnic background.

96. The conduct of defendants described above deprived plaintiff RICHARDSON of his rights under the Constitution and laws of the United States, including the right not to be discriminated against because of his race, color, or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy.

97. As a direct result of defendants PAPA and BIANCO's willful, malicious and unlawful actions and omissions, plaintiff RICHARDSON was subjected to emotional and mental stress because of the discriminatory practices.

98. As a direct result of defendants PAPA and BIANCO's discriminatory actions, plaintiff RICHARDSON was removed from the possibility of acquiring an advanced rating and rotation of positions for skilled rating and he will suffer loss and destruction of his naval career, loss upon discharge from naval service, and will suffer irreparable harm.

99. As a direct result plaintiff RICHARDSON has suffered damages in the amount of five hundred thousand dol-

lars compensatory damages and five hundred thousand dollars punitive damages.

WHEREFORE, plaintiff RICHARDSON prays for judgment against defendants BIANCO and PAPA as listed above, plus reasonable attorney's fees and the cost of this action.

SECOND CLAIM OF PLAINTIFF RICHARDSON

100.-107. Plaintiff RICHARDSON adopts paragraphs 91 to 98 as paragraphs 100 to 107.

108. Defendants PAPA and BIANCO conspired to deprive plaintiff RICHARDSON of his rights under the Constitution and laws of the United States in violation of 42 U.S.C. Section 1985.

109. As a direct result plaintiff RICHARDSON has suffered compensatory damages in the amount of five hundred thousand dollars and punitive damages in the amount of five hundred thousand dollars.

WHEREFORE, plaintiff prays for a judgment against defendants PAPA and BIANCO as listed above, plus attorney's fees and costs of this suit.

FIRST CLAIM OF PLAINTIFF SHANNON

110. On or about January 21, 1978, plaintiff SHANNON was transferred to the U.S.S. Decatur, Supply Department.

111. Since that date, plaintiff SHANNON has worked as a Messman aboard the U.S.S. Decatur. On or about the third week of July, 1978, defendant BIANCO threatened the plaintiff SHANNON by telling him that he would strangle him with his bare hands for keeping the refrigerator door open. Plaintiff SHANNON reported this to defendant CHAPPELL who said that defendant BIANCO is a fair officer.

112. On or about mid July, 1978, defendant BIANCO made plaintiff SHANNON and other messmen clean the stove in the galley with toothbrushes.

113. On or about July 31, 1978, defendants BIANCO, VIAFORE and CHAPPELL gave the plaintiff SHANNON

a very low evaluation. This was totally unwarranted and without basis in fact.

114. On August 15, 1978, defendant CHAPPELL told plaintiff SHANNON that he would be discharged from the U.S. Navy because he lacks "common sense". Based on information and belief, defendant CHAPPELL will recommend that plaintiff SHANNON be given an other than honorable discharge.

115. OPNAV Instruction 5354.1a, Chapter II, Section 5 (Equal Opportunity in Military Justice) mandates that there is equality of justice and treatment for minority personnel and nonmilitary personnel and that racial, ethnic, cultural or sexual basis not be factors.

116. The conduct of defendants described above deprived plaintiff SHANNON of his rights under the Constitution and laws of the United States, including the right not to be discriminated against because of his race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy.

117. As a direct result of defendants CHAPPELL, VIAFORE and BIANCO's willful, malicious and unlawful actions and omissions, plaintiff SHANNON was subjected to emotional and mental stress because of the discriminatory practices.

118. As a direct result of defendants CHAPPELL, VIAFORE and BIANCO's discriminatory actions, plaintiff SHANNON will suffer loss and destruction of his naval career, loss upon discharge from naval service, and will suffer irreparable harm.

119. As a direct result plaintiff SHANNON has suffered damages in the amount of five hundred thousand dollars compensatory damages and five hundred thousand dollars punitive damages.

WHEREFORE, plaintiff SHANNON prays for judgment against defendants CHAPPELL, VIAFORE and BI-

ANCO as listed above, plus reasonable attorney's fees and the cost of this action.

SECOND CLAIM OF PLAINTIFF SHANNON

120.-128. Plaintiff SHANNON adopts paragraphs 110 through 118 as paragraphs 120 to 128.

129. Defendants CHAPPELL, VIAFORE and BIANCO conspired to deprive plaintiff SHANNON of his rights under the Constitution and laws of the United States in violation of 42 U.S.C. Section 1985.

130. As a direct result plaintiff SHANNON has suffered compensatory damage in the amount of five hundred thousand dollars, and punitive damages in the amount of five hundred thousand dollars.

WHEREFORE, plaintiff prays for a judgment against the defendants CHAPPELL, VIAFORE and BIANCO as listed above, plus attorney's fees and costs of this action.

131. Plaintiffs have all exhausted their administrative remedies.

Plaintiffs pray:

1. For a preliminary and permanent injunction prohibiting the defendants from:

(a) threatening, or intimidating Black enlisted personnel;

(b) keeping Black personnel in unskilled rates or out of schools and more preferential jobs or advancement;

(c) awarding more punishment at Captain's Mast to Black enlisted personnel; or

(d) awarding or recommending less than honorable discharges to enlisted personnel because of their race, color or national origin, or because they advocate equal opportunity for all or because they seek redress for discrimination practiced against them.

2. For an injunction compelling defendants to implement the naval instruction dealing with equal opportunity and treatment (OPNAV INST 5354.1a) on the U.S.S. Decatur;

3. That they be awarded compensatory damages in the amount of five million dollars ($5,000,000.00);

4. that they be awarded punitive damages in the amount of five million dollars ($5,000,000.00);

6. for all costs of suit; and
7. For such other and further relief as is equitable

JOHN MURCKO
Attorney for Plaintiffs
/s/ John Muricko
Attorney for Plaintiffs

DATED: AUGUST 21, 1978

VERIFICATION

I, VERNON WALLACE, depose and say:

I am one of the plaintiffs in the above-entitled action. I have read the aforegoing COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES and know the contents thereof. I swear and affirm the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief and as to those maters, I believe them to be true.

Executed this 20 day of August, 1978 at San Diego, California.

/s/ Vernon J. Wallace, Jr., 20 Aug. 78
VERNON WALLACE

I, ROBERT LEMONS, depose and say:

I am one of the plaintiffs in the above entitled action. I have read the foregoing COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES and know the contents thereof. I swear and affirm the same is true of my own knowledge, except as to matters which are therein stated upon my information and belief and as to those matters, I believe them to be true.

Executed this 20 day of August, 1978 at San Diego, California.

/s/ EM3 Robert C. Lemons
EM3 ROBERT C. LEMONS

JOHN MURCKO
Attorney at Law
861 Sixth Avenue, Su. 806
Post Office Box 8284
San Diego, California 92102
Telephone: (714) 235-6921
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-0579-N

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON AND GEORGE SHANNON, PLAINTIFFS,

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT KENNTH JORDON, EMC RICHARD MCCANNON, ICC DAVID LAMSER, MSC LUMBERTO PAPA, DEFENDANTS

NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION PURUSANT TO RULE 65, FEDERAL RULES OF CIVIL PROCEDURE *

TO: Defendants and to their counsel of record:

Please take notice that on *October 12, 1978 at 9:00 A.M. or* as soon thereafter as counsel can be heard, plaintiff will move for a preliminary injunction against defendants for the below stated relief in Courtroom 5 of the United States District Court, 940 Front Street, San Diego, California.

Plaintiffs above named move this Honorable Court for a preliminary injunction in the above-entitled cause against the defendants above-named conformable to the complaint filed herein, enjoining defendants from:

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* Injunctive relief denied by Judge Nielsen after hearing 10/12/78

1. Retaining the plaintiffs aboard the U.S.S. Decatur while they are deployed for duty in the Western Pacific on or about October 16, 1978.

2. In the alternative, and should that be denied, prohibiting inter-department transfer of any of the plaintiffs from their current departments to First Division.

The grounds in support of this motion are:

1. The U.S.S. Decatur (DDG 31) (hereafter Decatur) is an older ship. It was commissioned in approximately 1958.

2. The Decatur was originally scheduled to leave San Diego for duty in the Western Pacific on September 25, 1978 with DesRon Seven. It did not leave on that day because it had serious problems with the boilers, and numerous leaks in the fuel tanks. See Exhibit A, Declaration of James Richardson, attached hereto and incorporated by reference.

3. The Decatur, at the present, has the following operating problems:

a. The floating head on the number one boiler in the number one fireroom is leaking with one hundred pounds per square inch of presure;

b. The number one switchboard in the main controlroom is seriously unstable. It is running at 62 cycles instead of the normal 60 cycles:

c. The force draft blower which blows steam into the boiler is broken down;

d. Several life rafts on the U.S.S. Decatur are full of holes;

e. The fuel tanks on the Decatur have numerous holes in them which were temporarily repaired with plastic coating;

f. The fourstrap blowers in the number one engineroom broke down from overheating on October 5, 1978; and

g. Fuel is seeping into the galleys, i.e., food preparation areas. See Exhibit B, Declaration of Vernon Wallace, Exhibit C, Declaration of Robert Lemons, Exhibit A, Declaration of James Richardson.

4. These conditions are extremely dangerous and at any time a boiler can explode, a steam pipe leakage can cut a person in half, a leaking fuel tank can explode, and an over-

heated switchboard or blower can cause a serious fire or explosion. Should these occur it would be extremely difficult for many crew members, including plaintiffs, to leave the ship since several of the life rafts have holes in them.

5. The plaintiffs have been constantly harassed, mistreated and oppressed both before and since they have filed this action. Plaintiff Lemons had valid orders to report for duty on the U.S.S. Prairie on October 4, 1978. He was suddenly notified on October 5, 1978 that his orders were being cancelled without any explanation. See Exhibits C and D.

6. Plaintiff Richardson also has suffered numerous actions of harassment and mistreatment since he has filed this action. See Exhibit A.

7. Plaintiff Wallace has suffered constant attempts by the command to intimidate and confront him because he has been an outspoken critic of the discriminatory practices on the Decatur. He has been ridiculed by his former division officer, Lt. Hagstrom, and treated derogatorily by his Commanding Officer, defendant Chappell. He has had serious problems from the pressures on the ship. A naval psychiatrist has recommended that he be given time off, yet it has been refused by defendant Chappell. See Exhibits D, E, F and G, letters of medical doctors.

8. Plaintiff Hickey is also being mistreated and defendant Bianco has been threatened to be transferred from supply Department to First Division (Deck). See Exhibit H, Declaration of John Murcko.

9. Also there are graffitti in the restrooms derogatory to the plaintiffs all of whom are black. The graffitti includes: "KKK = Kill Kolored Kids", "NAACP = Niggers Are Actually Colored Polacks," and "KKK". The command has made no effort to stop this action or to apprehend the responsible parties.

10. Finally, the plaintiffs are all needed here to prepare for the suit. See Exhibit H, Declaration of John Murcko.

Therefore, it is requested that this court issue a preliminary injunction against the defendants, ordering that plaintiffs be transferred off the Decatur immediately and be retained in San Diego pending determination of the suit.

11. In the alternative it is requested that defendants be enjoined from transferring plaintiffs from the current department in which they are working to First Division.

/s/ _____

JOHN MURCKO
Attorney for Plaintiffs

Dated: October 11, 1978

JOHN MURCKO
Attorney at Law
861 Sixth Avenue, Su. 806
Post Office Box 8284
San Diego, Ca. 92192
Telephone: (714) 235-6921
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-0579-N

VERNON WALLACE, ROBERT LEMONS, CORNELLIUS HICKEY, JAMES RICHARDSON AND GEORGE SHANNON, PLAINTIFFS,

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARANCE SCHULTZ, LIEUTENANT KENNETH JORDON, EMC RICHARD MCCANNON, ICC DAVID LAMSER, MSC LUMBERTO PAPA, DEFENDANTS.

MEMORANDUM OF POINTS AND AUTHORITIES

I
THIS COURT HAS JURISDICTION

This court has jurisdiction under the actions complained under 42 U.S.C. Section 1985, 28 U.S.C. Section 1311, and 28 U.S.C. Section 1343.

Bolling v. Sharpe, 347 U.S. 497 (1954);
Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969)
Griffen v. Breckenridge, 403 U.S. 88, 97 (1971);
Bivens v. Six Unknown Agents of the FBN, 403 U.S. 388 (1971).

II
COURTS HAVE HELD THAT VIOLATIONS OF CONSTITUTIONAL RIGHTS OF MEMBERS OF THE ARMED FORCES ARE SUBJECT TO REVIEW

Numerous courts have held that orders of the military are subject to court review where they are in violation of

the constitutional rights of members of the armed forces. *Winter v. United States*, 393 U.S. , 21 L.Ed.2d 80 (1953); *United States ex rel Chapparo v. Resor*, F.2d , 2 SSLR 3157 (4th Cir. 1969); *In re Brown v. Brown*, ___ F. Supp. ___, 3 SSLR 3404 (1970).

In *In re Brown, supra*, the court held that transfer by the army is subject to review by the civilian courts where it is not for military need or exigency or national defense, but is for punishing a serviceman for exercising his constitutional rights.

In the *Chapparo* case, the Court of Appeals held that civilian courts had the authority to inquire into the reasonableness of pretrial restraint of eight enlisted people awaiting court martial for speaking up against the Viet Nam war.

See also *Burns v. Wilson*, 346 U.S. 137 (1953); *United States ex rel Toth v. Quarles*, 350 U.S. 11 (1954) and *Reid v. Covert*, 354 U.S. 1 (1957).

III
A PRELIMINARY INJUNCTION SHOULD ISSUE

There are four requirements for a court to issue a preliminary injunction. They are (1) a strong showing that plaintiffs will prevail on the merits; (2) irreparable harm to the plaintiffs; (3) that the plaintiffs are in need of protection and the damages to the plaintiffs in absence of the injunction outweight the foreseeable harm to the defendants; and (4) the public interest. *Schwartz v. Covington*, 341 F.2d 537, 538 (9th Cir. 1965); *First Citizen Bank and Trust Company v. Camp*, 432 F.2d 481 (4th Cir. 1970).

In the instant case all four conditions exist. The plaintiffs will be irreparably harmed if they are forced to go on this WESPAC cruise. They could all be killed, or seriously maimed, or injured. At the least they could suffer mental harm from the constant harassment and mistreatment. Second, the plaintiffs could suffer irreparable harm because of the constant discriminatory treatment by the Anglo officers and non-commissioned officers. The defendants will not be harmed if these five persons leave the ship. They are only five out of three hundred and fifty crew members. Third,

the plaintiffs have a very strong case of discrimination based on clear discrimination in ranks and rates. There is no other recourse. The injunction should issue.

/s/_____

JOHN MURCKO

Attorney for Plaintiffs

DATED: October 11, 1978

DECLARATION

I, James Richardson, depose and say:

1. I checked aboard the U.S.S. Decatur in November, 1977. At that time I checked into Supply Division.

2. Since that time I have seen several violations of individual civil and constitutional rights. I later joined with four other crewmembers who felt as I did—that someone should bring these wrongs to light.

3. In so doing, I discovered that some of the crewmembers on the other side of the issue held my actions against me. I later talked with the Commanding Officer of the U.S.S. Decatur to explain my situation. This officer advised me that there was nothing he could do to assist me and that I should have thought of all of the consequences before deciding to sue the Decatur.

4. I find now that I am being harassed more often for even small things.

5. I feel that the ship itself is unsafe in that it has had several breakdowns. The repairs have been made on a hurry-up basis in order to make the correct deployment date.

6. In my work space I observed fuel all over the deck. When I reported it to my chief he made a call and, without even checking it for leaks, they said it would be okay. This is just one small example of the condition of the ship.

7. We were supposed to deploy sooner but we could not due to holes in the fuel tank.

8. I do not feel safe being aboard the U.S.S. Decatur, either physically or mentally.

9. All of my attempts to get off the ship have been stopped by the command. I feel the command wants me on the ship when it goes overseas to use me as an example of what happens when you speak out against the wrongs of the service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California on October 9, 1978.

JAMES A. RICHARDSON

DECLARATION

I, Vernon Wallace, depose and say:

1. I am a seaman (SN) in the U.S. Navy and am stationed aboard the U.S.S. Decatur (DDG 31), Naval Station, San Diego.

2. I have been aboard the U.S.S. Decatur since December 9, 1976.

3. In July, 1977, I testified at the court-martial of Wilbert Williams. In the main my testimony concerned the appearance of graffitti on the bulkheads in the washrooms and toilet areas of the U.S.S. Decatur. Such graffitti as "KKK" or "KKK = Kill Kolored Kids" or "NAACP = Niggers Are Actually Colored Polacks" appeared on these bulkheads.

4. I testified that I had reported to the command on the ship, but nothing had been done about it.

Shortly after this I began to feel a lot of pressures, both from the head of the department, Ensign McCloughlin and from the leading chief, BMC Simpson. I would repeatedly be chewed out and I also was constantly belittled by these two men, especially by Ensign McCloughlin.

In January, 1978, I was transferred to OI Division. I experienced the same type of treatment there from Lt. Jordan and Chief Parks. I was transferred out in July, 1978. to First Division.

5. In May, 1978, I was working in the Combat Information Center (CIC) OI Division. The ship was deployed to Hawaii. One day I came into work and noticed that a rope made in the shape of a noose was hanging in the overhead area of CIC. It was there nearly all morning from 8:00 a.m. to 12:00 p.m. and was highly visible. To me this represented a sign of the KKK. It frightened me. Chief Parks repeatedly passed it and looked at it but did nothing about it. I became outraged and prior to noon I told Chief Parks that the noose was against regulations and should be taken down. He seemed unhappy that I confronted him about it. Later, he told P03 Brandt in the work area to take it down.

6. During 1977 and 1978 I was repeatedly speaking up about the conditions on the ship, the inequality of treatment afforded to myself and other blacks, and the constant badgering by the OI command.

7. Lt. Jordan and Chief Parks would become irate when I raised these matters. They had threatened to take me out of OI Division, a skilled billet into 1st Division, an unskilled billet. This threat was finally carried out in July 26, 1978, contrary to the recommendation of the Professional Development Board.

8. Meanwhile, the graffitti of the KKK continued on the ship. Nothing was really done about it. It would appear, be washed off and reappear.

9. Also while in First Division, I was subjected to the same type of demeaning and viturbative action by the command there. I was constantly belittled and insulted. I feel this was because I am an outspoken black sailor.

10. In August, 1978, I began to feel the pressures from the command even greater after I filed suit in the federal district court concerning discrimination against me in rank, rate and job assignment.

11. In August, 1978, I felt that I could no longer take the pressure, so I went to the corpsmen to get some help. I requested hospitalization, but could not get it. The doctor noticed that I was tense and tight and very frustrated.

12. These feelings are the result of continuing harassment on board the U.S.S. Decatur. Lt. Hagstrom, First Division Department Head, confronted me as I was getting paint out of the paint locker. He said, "Hey, I thought you were out of First Division." Lt. Hagstrom knows full well that I am out but he said this just to ridicule and harass me. Also the Captain disrespects me by refusing to salute me or speak to me. These things may seem unimportant but the constant pressure is a difficult thing to deal with.

13. On August 29, 1978, I was seen by Dr. Davis because of my condition. He said that I had an anxiety problem.

14. On September 18, 1978 the pressures were continuing. I was under medication at this time. On that day while I was walking to the aft area on the ship, I suddently passed out and fell to the deck.

15. As a result of this I requested to take six days leave on September 26, 1978 to relieve some of the tension. This was denied by the Commanding Officer on September 28, 1978.

16. On October 3, 1978, I was again seen by Dr. Davis. He said that I suffered from tension headaches and possible diabetes. He "strongly recommended" that I be given leave for at least one week. It was not granted.

17. On October 5, 1978 I requested to be transferred from the U.S.S. Decatur. Conditions there are intolerable for Blacks and I cannot be treated in this way any longer. My health is deteriorating and I cannot take this discriminatory practice and treatment from the command.

18. The fuel tanks on the U.S.S. Decatur are unsafe due to numerous holes. Some of the holes were temporarily fixed with plastic coating.

19. The four strap blowers in Number One fireroom broke down from overheating on October 5, 1978 when the engine was started up.

I declare that the preceding is true and correct under penalty of perjury.

Executed in San Diego, California on October 9, 1978.

/s/_____

VERNON J. WALLACE, JR.

DECLARATION

I, ROBERT LEMONS, depose and say:

1. I am a Black crew member of the U.S.S. Decatur and have been assigned to Engineering Department since November 5, 1977.

2. On August 21, 1978, I filed a complaint in the United States District Court against several officers and non-commissioned officers for discriminatory actions by these persons in violation of my civil and constitutional rights. These violations included being assigned to perform more tasks that I could complete in a normal work day and being harassed when I did not and could not complete them. I was also objecting to the use of discriminatory evaluation.

3. Since that time I have taken part in press conferences, in rallies and in campaigns concerning my case and the bad conditions aboard the U.S.S. Decatur.

4. In July and early part of August, 1978, I was told by Chief McCannon that I would be transferred off of the U.S.S. Decatur. I was told that there were too many petty officers aboard the ship and that I had been selected to be transferred by Lt. Schultz and Chief Lamser.

5. On October 4, 1978, I was notified by the ship's personnel officer, Chief F. Wilde, Jr., that I had received my orders from the Chief of Naval Personnel that I was to be transferred to the U.S.S. Prairie (AD-15).

6. The U.S.S. Decatur was to deploy to duty in the Western Pacific in mid-October, 1978 and I was to be transferred to the U.S.S. Prairie prior to that time.

7. On October 5, 1978, I was ready to check off of the ship. I inquired of Chief Wilde as to my checkout sheet. He said that he was told by the new executive officer, LCDR Young, that I was not to be transferred off of the ship, but instead I was to stay aboard the U.S.S. Decatur.

8. I believe that this is part of the tactics of harassment levied against me by the command because I am Black and have spoken out against the discriminatory practices on the ship. I also feel that this was done to keep me away from my lawyer.

9. I also believe that the U.S.S. Decatur is in exceptionally poor condition and that I should not be forced to go to the Western Pacific with the ship when it leaves. The following unsafe conditions which I personally inspected or learned about show that the ship is a hazard to the crew member. First, on October 4, 1978, I visited the fireroom. I saw that the floating head on the number one boiler was leaking with one hundred pounds per square inch of pressure. The steam has just a great force. It could cut a person in half. A total breakdown on one boiler could cause the ship's engines to breakdown. If this breakdown occurs, I could be injured and the ship stalled in mid-ocean.

Second, on the same day I also noticed that the number one switchboard in main control, number one engineroom, was seriously unstable. It is running at 62 cycles. It should be running at 60 cycles. Normal is 60 cycles. If this condition is allowed to continue, it could cause a serious fire and explosion on the ship. It is a fire hazard.

Third, I spoke to MN3 Renifer on October 3, 1978. He told me that the force draft blower in the main control room was broken down.

They blew steam into the boiler system. If it is not working properly, the steam system would not work. The turbines will not operate. This would, in effect, result in a breakdown of the electrical systems.

Fourth, I checked three life rafts on the U.S.S. Decatur (FR 79, 73 and 71). There were holes in the life rafts.

I declare under penalty of perjury the foregoing is true and correct.

Executed at San Diego, California on October 11, 1978.

/s/ _____
ROBERT LEMONS
by JOHN MURCHO

DECLARATION

I, JOHN MURCKO, depose and say:

1. I am the attorney for Robert Lemons.

2. On or about October 8, 1978 I interviewed Robert Lemons concerning his problems on the U.S.S. Decatur. Because of his duty assignments and the movements of the U.S.S. Decatur, I was not able to get his statement to him before the ship left.

3. However, on October 9, 1978 I did read his statement to him and he agreed that it was true and correct. On October 10, 1978 he authorized me to sign the statement on his behalf.

I declare that the preceeding is true and correct under penalty of perjury. Executed in San Diego, California on October 11, 1978.

/s/ _____

JOHN MURCKO

04 OCT 78

USS DECATUR (DDG-31) at San Diego, CA (UIC 52196) HP: SDiego | 04 OCT 78

AUTHORITY: BUPERS TC B2788/L1 | CIC: AJDJ91S3

	NAME IN FULL	SSN	PAY GRADE RATE AND RMC	CLASS	DEP	AD	TRVL
1	Robert Charles LEMONS	454-74-1259	E-4/EM3 (EM 0000/0300)	USN	1	1	1
2	AND NO OTHERS E-4 with more than 2 years service.						

PROCEED AS DIRECTED AND REPORT TO THE FOLLOWING STATIONS IN THE ORDER NAMED

INTERMEDIATE STATION	NATURE OF DUTY
NONE	
INTERMEDIATE STATION	NATURE OF DUTY
NONE	
INTERMEDIATE STATION	NATURE OF DUTY
NONE	
ULTIMATE DESTINATION: Commanding Officer, USS PRAIRIE (AD-15) HP: San Diego, CA (UIC 04620) ACC 100	NATURE OF DUTY: FOR DUTY

DELAY AUTHORIZED (Computed on leave)	TRAVEL/PROCEED TIME AUTHORIZED	REPORT NOT LATER THAN	
-15- NUMBER OF DAYS	-00PT-00TT- NUMBER OF DAYS	22 October 1978 DATE	0900 HOUR

ADDRESS WHILE ON LEAVE

SUPPLEMENTAL INSTRUCTIONS

SECNAVFLTD NOT REQUIRED
ETOS: 28 AUG 79
LV BAL: +06.5
AUTH 3 MOS ADV PAY
AUTH ADV LV RATE

NEW DUSTA MAILING ADDRESS
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YOU ARE DIRECTED TO REPORT TO THE APPROPRIATE HOUSING REFERRAL OFFICE PRIOR TO NEGOTIATING ANY AGREEMENT FOR OFF BASE HOUSING - NAVY LODGE INFORMATION PROVIDED

F. WILDE JR, PNC, USN, PERSOFFSYDIRCO

APPROPRIATE CHARGEABLE AND APPLICABLE ACCOUNTING DATA FOR TRAVEL AND PCS ITEM EXPENSES INCURRED

TAC	APPROPRIATION SYMBOL AND SUBHEAD	CLASS CODE	BUREAU CONT. NO.	SUB. AUTH. RATE	AUTH. ACCTG. ACTIVITY	TYPE (OPTAR)	PROP. ACCTG. ACTIVITY	COST CODE
PCS ACCOUNTING DATA								
HDJ9	1791453.2252			E	00C022	AJ	DJ9/1/S/3	DJ94547412S9
TEMPORARY PER DIEM ACCOUNTING DATA								

ENTER FOLLOWING IN FISCAL DATA SECTION OF TRANSPORTATION REQUEST FROM PCS ACCOUNTING DATA

COST	SAME AS ABOVE	SGI	LEAVE BLANK	SAME AS ABOVE	SAME AS ABOVE	SAME AS ABOVE	ENTER AS ABOVE AS TRAVEL ORDERS NO.	SAME AS ABOVE

THE FOLLOWING TRANSPORTATION IS AUTHORIZED

[X] GOVERNMENT [ ] COMMERCIAL [X] BY PRIVATELY OWNED VEHICLE [ ] OTHER

TRAVEL INDICATED IS DIRECTED

[ ] GOVT AIRCRAFT (If Navy available) [ ] COMMERCIAL	PRIORITY	FROM	TO

DISBURSING OFFICER IS HEREBY AUTHORIZED AND DIRECTED TO FURNISH SUCH TRANSPORTATION/SUBSISTENCE AS MAY BE REQUIRED IN THE EXECUTION OF THESE ORDERS

TRANSFER CODE NO.	AUTHENTICATING SIGNATURE	RANK	TITLE
0730, 06 OCT 78	F. WILDE JR	PNC, USN	PERSOFFSYDIRCO

I HAVE READ AND UNDERSTAND THESE ORDERS AND INSTRUCTIONS AND I HAVE RECEIVED THE RECORDS AND ACCOUNTS AS INDICATED.

SIGNATURE OF TRAVELER OR SENIOR IN CHARGE: Robert Charles Lemons

DELIVERED/NOTIFIED 040CT78 "SUPPORT YOUR LOCAL RECRUITER" Call the Navy Recruiting Command's toll free number 800-841-8000

Exhibit "D"

Standard Form 513
General Services Administration and
Interagency Committee on Medical Records
GSA FPMR (41 CFR) 101-11.8
October 1975

CLINICAL RECORD | **CONSULTATION SHEET**

REQUEST

TO: Psychiatry Bldg 36-4 | FROM: (Requesting ward, unit, or activity) USN STA | DATE OF REQUEST 8 Oct 1978

REASON FOR REQUEST (Complaints and findings)

Please evaluate this 21 yr old black male re: situational concern as a reason for his anxiety. No hospital or outpatient psychiatric history.

PROVISIONAL DIAGNOSIS

Situational Anxiety

DOCTOR'S SIGNATURE | APPROVED | PLACE OF CONSULTATION ☐ BEDSIDE ☐ ON CALL | ☐ EMERGENCY ☑ ROUTINE

CONSULTATION REPORT

I saw this 21 y/o SN, in service N 2 yrs on 4 yr. enlist on present ship 18 mo & it is his understanding he will be there for the remainder of his tour. He feels there is unnecessary bickering among his shipmates & feels in part this may be due to ethnic differences. He wishes this were different, but does not know how to help effect such subtle changes, & says he has felt a sense of frustration. Nonetheless he is looking forward to fulfilling his military obligations & to eventually going to college.

SN Wallace is an alert, cooperative, well-groomed, nearly-adult young man who is fully oriented & coherent w/ intact sensorium & at least average intellect, & who denies any depressive intent. There is no evidence of any thought disorder. His affect is full, flexible, & appropriate. He certainly seems concerned w/ life aboard ship, but his mood does not seem remarkable for depression @ this time.

Impression: No psychiatric dx. I of course do not say my views fully understand his grievances w/ respect to his ship, & so I have mentioned he seems markedly concerned w/ them. This sort of thing is not to be considered (i.e., his concern & grievances) psychiatric illness.

Thank you for letting me see [illegible] on Yeoman 2nd interview by my team.

SIGNATURE AND TITLE | DATE | IDENTIFICATION NO. | ORGANIZATION

[illegible] Psychiatrist MC USNR

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

WALLACE, VERNON J.
SN USN 465-13-2185
USS DECATUR (DDG-31)

REGISTER NO. # 233-2966 | WARD NO. 29-B

S/N 0105-LF-201-2602

CONSULTATION SHEET
Standard Form 513
513-105-07

Exhibit 7

Standard Form 513
General Services Administration and
[illegible] Committee on Medical Records
[illegible]
[illegible]

CLINICAL RECORD — CONSULTATION SHEET

REQUEST

TO:	FROM: (Requesting ward, unit, or activity)	DATE OF REQUEST
NAVSTA/BEC CLINIC S. DIEGO.	USS DECATUR (DD 936-31)	28 Aug 78

REASON FOR REQUEST (Complaints and findings)

2.1 y/o Negro CS [illegible] to s/c c complaint of anxiety and tension aboard ship (core strength). Says he [illegible] Law suit against several officers aboard this command and apparently have been [illegible] not requested for several days [illegible] pathway [illegible] Falls. Since appears very relaxed when seen out of sight & friends but apparently is experiencing work anxiety ?? was explained hospitalization on above request is not authorized. Request c see M.O. for possible Rx.

PROVISIONAL DIAGNOSIS

Situational Maladjustment

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	
[signature]		☐ BEDSIDE ☐ ON CALL	☐ EMERGENCY ☒ ROUTINE

CONSULTATION REPORT

T 98.8 BP 120/60

Referred @ 1330 on 29 Aug 78

[signature]

c.c. Patient feels just because he and 4 others have instituted suit against their superior officers for harassment etc. he feels Tight and tense because of conditions

He is alert and aware. and has no evidence of thought defect or personality defect.

(Continued on reverse side)

SIGNATURE AND TITLE	DATE	IDENTIFICATION NO.	ORGANIZATION

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)	REGISTER NO.	WARD NO.
WALLACE. Vernon. F. SN USN 465-18-2185 USS DECATUR (DD 936-31)		

S/N 0105-LF-301-3502 CONSULTATION SHEET Standard Form 513 513—105—82

Exhibit "F"

35

He exhibits signs of frustration with his lot and strikes he cries without reason at times. He comes from a family of three who parents were divorced 10 yrs ago. He finished High School and joined Navy after graduation.

He is being referred to Psychiatry for clearance to exclude psychosis.

Philip B. Mitchell

Standard Form 513

CLINICAL RECORD | **CONSULTATION SHEET**

REQUEST

TO: Medical Officer	FROM: (Requesting ward, unit, or activity)	DATE OF REQUEST
NAVSTABRCLINIC, San Diego	USS DECATUR (DDG-31)	22SEP78 ~~23SEPT78~~

REASON FOR REQUEST (Complaints and findings)

(1) 21 y/o ♂ reported to SL
states to be seen Dr. Davis this morning & U.R.
was directed to return to ship to pick up slip.
Slip was stopped by sickbay because pt complained of
tension in back of neck and HA. appears pt has a
tension aboard ship. Please examine & advise.
(2) Pt. returning to ship as per C.O.'s. advise due to
H.A.'s. Slip was requested by LT as recommended

PROVISIONAL DIAGNOSIS

Tension head ache

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	
R. HERNANDEZ, HMC		☐ BEDSIDE ☐ ON CALL	☐ EMERGENCY ☒ ROUTINE

CONSULTATION REPORT

by Dr. DAVIS: Due to 30 days LV this year and apparently
due to work load present request was denied. Pt returned
back to sickbay for Rest of H.A.'s. Request Rx could I have
advised pt to cut present Rx of Relafen given for H.A.'s. Pt
quit taking same because he didn't like the way it made
him feel.

T 98.9 BP 102/58

SAN DIEGO, CA

Has ca noted before + seen 18 Sept 78
Patient examined + found to
suffer from tension headache, also +
Hx exam to Rs diabetes. At this time
Strongly recommend patient be allowed
take ajard leave for at least one week
under these circumstances and with this
(Continued on reverse side) Authority

SIGNATURE AND TITLE	DATE	IDENTIFICATION NO.	ORGANIZATION
[illegible] LT USN	18 Sep 78		

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)	REGISTER NO.	WARD NO.
WALLACE, Vernon, J. SN, USN 465-13-2185 USS DECATUR (DDG-31)		

S/N 0105-LF-301-3502 CONSULTATION SHEET
Standard Form 513
513-109-02

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DECLARATION

I, JOHN MURCKO, depose and say:

1. I am an attorney authorized to practice in the state and federal courts in the State of California.

2. On or about October 2, 1977, I spoke to Lt. Gary Elkins, Naval Litigation, Bureau of Naval Personnel, Washington, D.C. I asked him to request of the Chief of Naval Personnel that my five clients, Vernon Wallace, Robert Lemons, George Shannon, Cornelius Hickey, and James Richardson, be permitted to stay in San Diego, California while the U.S.S. Decatur was deployed for duty in the Western Pacific from mid-October, 1978 to mid-April, 1979. I told him that this was necessary to enable us to prepare for the case which would be heard in six to twelve months. Also I told him that my clients were being intimidated, mistreated and harassed by the command on the U.S.S. Decatur and it would be in the interests of both the Navy and my clients if they could be transferred off of the ship pending determination of the action.

3. On October 6, 1978, I was notified by Lt. Gary Elkins that the Chief of Naval Personnel denied requests for transfer of my clients off of the Decatur which I had made on October 2, 1978.

4. I spoke to my client Cornelius Hickey on October 9, 1978. He notified me that his department head, Lieutenant Barron Bianco, had threatened to transfer him from Supply Department to First Division, Deck One, where he would probably be involved in chipping paint and cleaning decks. This is in violation of naval regulations OPNAV Instruction 5354.1A, Chapter II, Sections 5 and 8 which require equality of treatment for minority personnel and that racial, ethnic, and cultural or national factors should not be considered in duty assignments.

4. By making these threats to transfer plaintiff Hickey, defendant Bianco is violating naval regulations because he is using racial factors in determining who to transfer to less desirable duty assignments. Duty in First Division is the least desirable on the ship.

I declare that the preceding is true under penalty of perjury. Executed at San Diego, California on October 11, 1978.

/s/ _____

JOHN MURCKO

Attorney for Plaintiffs

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San Diego, California 92102
Telephone: (714) 235-6921

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 78-579-N

Filed January 2, 1979

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON AND GEORGE SHANNON, PLAINTIFFS,

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT BARRON BIANCO, LIEUTENANT KENNETH JORDON, FMC RICHARD MCCANNON, ICC DAVID LAMSER, MSC LUMBERTO PAPA, DEFENDANTS.

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR AN ORDER GRANTING SUMMARY JUDGMENT

STATEMENT OF FACTS

Plaintiffs' claims are not very complex. Plaintiffs are all Black Americans who enlisted in the United States Navy and are currently assigned to Weapons Department, Supply Department and Engineering Department aboard the U.S.S. Decatur (DDG 31). The command of the U.S.S. Decatur is made up essentially of the defendants who are all Anglo American or white officers. The plaintiffs are being discriminated against in their job assignments, in the schools they can attend, in the treatment at Non-Judicial Punishment, in their quarterly marks and in the skilled rates because they are Black.

Defendants committed these acts against the plaintiffs in violation of their Constitutional civil rights in an effort to

keep plaintiffs in the unskilled ratings in the United States Navy, in the most dangerous and dirtiest assignments, in the most unpleasant surroundings, out of schools where it is possible to advance, out of the advanced rates and in a condition of servitude and dependency. Plaintiffs are also discriminated against at Captains Masts, in evaluations and by being processed for discharge. As a result of defendants' malicious and discriminatory acts, plaintiffs will not be able to develop careers in the Navy and will suffer once they are discharged. Plaintiffs seek money damages from defendants, a declaratory action stating their rights, and injunctive relief against continued discrimination.

Plaintiffs request leave to amend the complaint, pursuant to Rule 7 and Rule 15 of the Federal Rules of Civil Procedure to allege a cause of action against the defendants pursuant to 42 U.S.C. 1981, for discriminatory violation of their contract.

The defendants have filed a motion to dismiss. The bases are lack of jurisdiction (discriminatory acts of military officials are not reviewable, a servicemember cannot sue another servicemember), failure to exhaust administrative remedies, and immunity from suit. The defendants have also filed a motion for a summary judgment based on ten affidavits that purport to show a lack of discrimination.

I

THE FEDERAL DISTRICT COURT HAS JURISDICTION OVER SUITS BY SERVICEMEMBERS WHERE THEIR CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY OTHER SERVICEMEMBERS.

A. Discretionary Military Decisions Involving Violation of Constitutional Rights Are Subject to Review.

Actions by military commanders who abuse their discretion and violate constitutional rights of their subordinates are answerable in federal actions. *Dinsman v. Wilkes*, 12 How. 389, 53 U.S. 414 (1851); *Allen v. Monger*, 583 F.2d 438 (9th Cir. 1978); *Huff v. Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1975).

The cases cited by the defendants are not applicable. They involved solely the exercise of command discretion

without the violation of constitutional rights. *(Orloff v. Willoughby*, 345 U.S. 38—improperly assigning duties during wartime; *Arnheiter v. Chaffee*, 435 F.2d 691—relieving an officer of command of a ship during wartime; *Keister v. Resor*, 462 F.2d 471—activation of reservists during wartime).

B. A Serviceman May Sue Another For Violation of His Constitutional Rights.

It must be made perfectly clear that this is not an action for negligence on the part of the defendants. This is an action against defendants for violation of the constitutional equal protection and due process rights of the plaintiff by failure to follow the Constitution, statutes and naval regulations dealing with job assignments, schooling, punishment, discharge and mistreatment of Blacks because of race, color and nationality.

The Supreme Court has held in numerous cases that the federal district court has jurisdiction to hear suits and claims brought by members of the military against other members of the military when their constitutional rights have been violated. This includes violations of Fifth Amendment and Sixth Amendment rights at a court-martial. *Burns v. Wilson*, 346 U.S. 137 (1953) (denial of Sixth Amendment right to counsel, due process rights of a fair trial, of a forced confession, of manufactured evidence, and of coerced witnesses); *O'Callahan v. Parker*, 395 U.S. 258 (1969) (denial of Fifth Amendment right to indictment by a grand jury and Sixth Amendment right to a jury trial); *Relford v. Commandant*, 401 U.S. 355 (1971) (denial of right to jury trial); *Noyd v. Bond*, 395 U.S. 683 (1969) (denial of due process by failing to follow federal statutes and military regulations in post-court-martial review actions), *Daigle v. Warner*, 390 F.2d 358 (9th Cir. 1974) (denial of right to attorney at a summary court-martial); *Mitchell v. Swope*, 224 F.2d 365 (9th Cir. 1977) (right to counsel); *Kaufman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969) (denial of right against self-incrimination and right to cross-examine witnesses); *United States v. Augenblick*, 393 U.S. 348 (1969).

Federal courts also have jurisdiction in suits by members of the military against their commanding officers for violation of their rights against unreasonable searches and seizures guaranteed by the Fourth Amendment. *Committee fore GI Rights v. Callaway*, 518 F.2d 466, 474 (D.C. Cir. 1975) ("We recognize, of course that GIs are entitled to the protection of the Fourth Amendment as are all other American citizens."); *Kaufmann v. Secretary of the Air Force*, 415 F.2d 991, 996 (D.Cir. 1969).

Jurisdiction also exists for suits by military personnel against their superiors for violation of their rights to freedom of speech and press guaranteed by the First Amendment. *Parker v. Levy*, 417 U.S. 733 (1974) (prohibiting the making of statements to other enlisted personnel concerning the Vietnam War); *Secretary of the Navy v. Averech*, 418 U.S. 676 (1974) (prohibiting the distribution of literature to enlisted people); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1974) (right to have posters in barracks); *Huff v. Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1978) (Marine Corps enlisted enjoined their superior from prohibiting their distribution of petitions to Congress on the military base); *Cortright v. Resor*, 325 F. Supp. 797 (E.D.N.Y. 1971) *rev'd on other grounds*, 447 F.2d 245 (2nd Cir. 1971) *cert. denied* 405 U.S. 965 (1972) (signing and circulating petitions); *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970) *cert. denied* 401 U.S. 982 (1971) (distribution of literature on base); *Dash v. Commanding General*, 307 F. Supp. 849 (1969) *aff'd per curiam* 429 F.2d 427 (4th Cir. 1970) *cert. denied* 401 U.S. 981 (1971) (holding an open meeting on base).

In *Allen v. Monger*, 583 F.2d 438 (9th Cir. 1978) the Court of Appeals in this circuit held that enlisted members of a naval vessel may bring an action in federal district court against their commanding officer when the latter denied them the right to distribute a petition and attempted to solicit signatures on a petition which was intended for Congress. Jurisdiction was held to exist on the basis of 28 U.S.C. 1331 and 10 U.S.C. 1034. The court held that the Navy did not have the right to "require a system of

prior restraints" in circulating petitions to Congress. Damages were allowed in that action.

Military personnel also can bring actions against their commanders for violations of their First Amendment right to be free of the attempts of the military to establish a religion. *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1971) (illegal to require servicemen to attend church services).

The court in *Cortright v. Resor*, 447 F.2d 245, 254-5, stated:

> "We are far from holding that under no circumstances could a civilian court interfere with a transfer order or prescribe other relief if that were needed to prevent abridgment of a soldier's first amendment rights."

See also, *Friedman v. Froehlke*, 470 F.2d 13511 (1st Cir. 1972); *Hugh v. Seaman*, 493 F.2d 298 (4th Cir. 1974); *Miller v. Ackerman*, 488 F.2d 920 (8th Cir. 1973) (denial of right to wear wig by commanding officer is arbitrary, irrational and unreasonable action).

The federal courts have recognized jurisdiction of suits by military personnel against their military superiors for violations of due process rights of servicemen at administrative hearings. *Hagopian v. Knowlton*, 470 F.2d 201 (2nd Cir. 1972) (denial of right to hearing); *Wasson v. Trowbridge*, 382 F.2d 807 (2nd Cir. 1967) (same); *VanderMolen v. Stetson*, 471 F.2d 617 (D.C. Cir. 1977) (denial of right to attorney, to notice, to call and to cross-examination of witnesses); *Grimm v. Brown*, 449 F.2d 654 (9th Cir. 1971) (denial of a "fair and impartial hearing"). Jurisdiction also exists when Navy officials fail to comply with their own regulations. *Kimball v. Commandant, Twelfth Naval District*, 423 F.2d 88 (9th Cir. 1970) (hardship discharge); *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970) (denial of deferment); *United States ex rel Brooks v. Clifford*, 409 F.2d 700 (4th Cir. 1969); *Feliciano v. Laird*, 426 F.2d 424 (2nd Cir. 1971); *Nixon v. Secretary of the Navy*, 422 F.2d 934 (2nd Cir. 1970); *Pitcher v. Laird*, 421 F.2d 1972 (5th Cir. 1972).

Finally, we come to violations of equal protection as they are embodied in the due process clause of the Fifth Amendment. The United States Supreme Court held that jurisdic-

tion exists in a suit by a naval lieutenant against his superiors concerning denial of due process and equal protection guarantees by failure to promote officers. The court had jurisdiction and decided the issue of equality of treatment by sex in an issue concerning members of the military. *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

But even more important, in *Alvarez v. Wilson*, 431 F. Supp. 136 (N.D. Ill. 1977) the court held that a black naval lieutenant can sue his naval superiors in an action for damages where the complaint alleged violation of constitutional rights under the Fifth Amendment for racial discrimination. The court stated:

> "The complaint alleges that defendants unlawfully deprived plaintiff of liberty without due process of law when they hospitalized him without a hearing or other safeguard or procedural due process for five days. Alvarez also claims that the various defendants all discriminated against him on the basis of race, and this is the more important allegation. The due process clause of the Fifth Amendment clearly embraces principles of equal protection of law guaranteed by the Fourteenth Amendment. *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). And intentional discriminatory conduct by federal officials, regardless of the fairness of the laws under which they act, constitutes a violation of the concept of equal protection of law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973). There can be no question that Alvarez's complaint alleges deprivation of federally protected rights.
>
> The remaining question is the power of the court to shape a remedy in money damages. Recognizing that damages is the traditional legal remedy, this court recently held that money damages are appropriate in an action against city officers and the City of Chicago for an unlawful arrest and confinement arising under the due process clause of the Fourteenth Amendment. *Williams v. Brown*, 398 F. Supp. 155 (N.D. Ill. 1975). The *Williams* case is clearly apposite with respect to plaintiff's allegations that the hospitalization deprived

him of liberty without due process of law. Money damages are also appropriate to redress racial discrimination. Several courts have held that damages are available in racial discrimination cases brought against private citizens and state officials under § 1981, § 1972, and § 1983. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969); *McCrary v. Runyon*, 515 F.2d 1082 *aff'd., Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). In *Maybanks v. Ingraham*, 378 F. Supp. 913 (E.D. Pa. 1974), the court held that defendant was subject to an action for damages directly under the Fourteenth Amendment for allegations of racial discrimination. There is no reason to deny compensatory and punitive damages for the same substantive constitutional violation in an action against federal officials brought directly under the due process clause of the Fifth Amendment. *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146, 1157 (4th Cir. 1974).
...[D]efendant naval officers are subject to a damage action under the Fifth Amendment ..."

Authority is legion for the proposition that federal courts have jurisdiction over suits by military personnel against their officers for violation of their constitutional rights and to obtain relief by way of injunction, declaratory judgment, mandamus and also damages.

In this case, the defendants violated plaintiffs' constitutional rights to due process and equal protection in three regards. First, and most important, they denied plaintiff WALLACE equal opportunity to a skilled position in the United States Navy, to training and to advancement, solely because of his race, color and national origin. They denied plaintiff LEMONS equal opportunity to take the examination for second class petty officer and gave him a low evaluation solely because of his race, color and national origin. They denied plaintiffs HICKEY and RICHARDSON opportunity to advance in rate by denying them the opportunity to attend record school or the opportunity to work as a record clerk solely because of their race, color and national origin. They also denied plaintiff SHANNON the right to be free from physical threats and abuse, and the equal opportunity to obtain evaluations and a discharge commensu-

rate with his performance, solely because of his race, color, and national origin. This type of discrimination is a violation of the equal protection clause to the United States Constitution as the United States Supreme Court has held in numerous cases to be unlawful. Many suits have been brought against government officials to enjoin them from discrimination and to correct invasions of constitutional rights. See, *Ex Parte Young*, 209 U.S. 123 (1908); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 228 (1964); *United States v. City of Chicago*, 395 F. Supp. 329 (N.D. Ill., 1975); *Douglas v. Hampton*, 532 F.2d 976 (D.C. Cir. 1975).

Second, the defendants also violated federal statute by conspiracy to deprive plaintiffs of their civil rights because of their race and color in violation of 42 U.S.C. 1985.

Third, the defendants also violated naval regulations regarding race relations and discriminatory treatment which is a further violation of due process and has been so held in *Alvarez v. Wilson*, 431 F. Supp. 136 (N.D. Ill. 1977).

The defendants allege that plaintiff's action is barred by the doctrine that a military personnel cannot sue his superior. However, the main part of defendants' points and authorities is directed to the proposition that "a soldier [cannot] recover for *negligence either* against *his superiors* or the government he is serving." See, page six. The main authorities cited are *Feres v. United States*, 340 U.S. 135; *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666; *Bailey v. Van Buskirk*, 345 F.2d 298 and *Hass v. United States*, 518 F.2d 1138. But all of these cases are not applicable here. Most of them are actions for claims filed under the Federal Tort Claims Act. They are for negligence resulting from acts of their superiors. They do not involve intentional violation of constitutional rights. The action here does not involve negligence at all or a claim under the Federal Tort Claims Act. It concerns constitutional rights that a person cannot be discriminated against because of race, color or nationality. A war was fought over this right. Millions of people died for the freedom of black people. Are we to cast that all aside today? None of the cases cited by defendant are binding here where the sole consideration is violation of constitutional and statutory rights.

II

THE DOCTRINE OF SOVEREIGN IMMUNITY IS NOT APPLICABLE IN THIS CASE

There is no question but that there is a doctrine of immunity and that a leading case on the issue is *Barr* v. *Matteo*, 360 U.S. 564 (1959). It is important, however, to read *Barr* in the light of its own express qualification; it decided "the law of privilege as a defense by officers of government to civil damage suits *for defamation and kindred torts....*" [Emphasis added]. 360 U.S. at 569. That *Barr* is a free speech case and that the executive privilege afforded in *Barr* was likened to that under the Constitution for members of both Houses of Congress for a speech, debate, vote, report or action done in session is clear. 360 U.S. at 569. Nothing in *Barr* can be construed to continuance with impunity occasional deprivations of due process of law or the right to a hearing or a straying from set rules and regulations in the name of expediency or ease of administration.

The purpose of sovereign immunity is to prohibit suits against the government which deplete the government's funds or affects the officer in the exercise of his official functions. *In re Ayers*, 123 U.S. 443 (887); *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902).

There are two major exceptions to the rule. The doctrine of total immunity does not apply if the officer's official actions were not those sanctioned by the government. In other words if his actions were beyond his authority or violated the Constitution, they are not immune from suit. *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682 (1949).

> "[W]here the [federal] officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief." 337 U.S. at 689.

Bowers v. *Campbell*, 505 F.2d 1155, 1158 (9th Cir. 1974).

Similarly in *Dugon* v. *Clark*, 372 U.S. 609, 621-33 (1963), the Supreme Court noted the rule of sovereign immunity, then stated the exceptions:

> "Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void.... In either of such cases the officer's action 'can be made the basis of the suit for specific relief against the officer as an individual....'"

More recently, the Supreme Court again addressed itself to the question of immunity in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). *Scheuer* was a 1983 civil rights action by representatives of Kent State University students, who had been shot and killed by Ohio National Guardsmen on the Kent campus, against the Governor of Ohio, senior and subordinate officers and enlisted personnel of the Ohio National Guard and the President of the University. The court held that the immunity it had granted in *Barr* and indeed any grant of immunity, was by no means absolute. The very purpose of *Monroe* v. *Pape*, 365 U.S. 167 (1961) and the Civil Rights Acts themselves, held the court, was "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." The *Monroe* court expressly stated that through the civil rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. 365 U.S. at 171-172. See also, *Scheuer* v. *Rhodes*, 416 U.S. at 243. See also, *Andros* v. *Rupp*, 433 F.2d 70, 72-3 (9th Cir. 1970); *Washington* v. *Udall*, 417 F.2d 1310, 1313-16 (9th Cir. 1969).

In the most recent case in the Ninth Circuit, *Bowers* v. *Campbell*, 505 F.2d 1155 (9th Cir. 1955), the issue of sovereign immunity was raised. The plaintiff, a federal civilian employee of the United States Naval Air Station in Alameda, California, brought suits against federal naval officers on the basis that her removal from a trainee position, denial of later promotions, harassment and reprimands were

based on racial discrimination. The action was based on 42 U.S.C. 1981 and 28 U.S.C. 1343(4). The court held:

> "Sovereign immunity poses no jurisdictional bar to Bowers' action against the named NAS officials. If Bowers eventually prevails on her section 1981 claim, it will be because the federal officials have engaged in racially discriminatory employment practices that are forbidden by that section. '[W]here the [federal] officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'"

The court found that racially discriminatory employment decisions by federal officials were *ultra vires* their authority as limited by 42 U.S.C. 1981.

In *Penn* v. *Schlesinger*, 490 F.2d 700, *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc), black federal employees suing on behalf of themselves and similarly situated blacks in Alabama, alleged a cause of action under 42 U.S.C. 1981 because seventeen federal agencies in the State maintained racially discriminatory promotion and advancement practices. The court held that section 1981 prohibited discriminatory acts by federal officials. It also held that a violation of section 1981 by a federal official was an *ultra vires* act for which he is personally liable and the action is not barred by sovereign immunity.

Also in *Alvarez* v. *Wilson*, 431 F.Supp. 136 (N.D. Ill. 1977), a naval lieutenant sued his superior officers individually for racial discrimination in removing him from his job in race relations and unlawfully depriving him of liberty. The action was based on the *Bivens* case, 42 U.S.C. 1985 and 28 U.S.C. 1331. The court held that naval officers are subject to a damage action by another member of the Navy for actions under the Fifth Amendment. Sovereign immunity does not bar this type of suit.

The same exception is applicable here. The defendants do not enjoy sovereign immunity. Their actions were violations of the equal protection clause, federal statutes, and naval regulations outlawing discrimination. Their actions were also *ultra vires*. This case is controlled by the *Larson-Dugon* doctrine and by the *Bowers* case.

III

THE DEFENDANTS DO NOT ENJOY OFFICIAL IMMUNITY FOR LIABILITY FOR MONEY DAMAGES

It must be remembered that the plaintiffs' position is that the defendants' acts were outside the scope of statutory authority, naval regulations and constitutional authority. Further, the defendants acted outside the scope of their duties and abused their discretion in the racially motivated treatment of the plaintiffs.

The defendants are not shielded from liability for this opprobrious racial conduct and violation of constitutional and civil rights. *Bivens*, the Fifth Amendment to the United States Constitution and the Civil Rights Acts are applicable to federal officials.

There is no absolute immunity. The qualified immunity available is as the court of Schever defined (416 U.S. at 247-248):

> "...[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in the light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

There is nothing sacrosanct about the military that renders constitutional violations by the Navy remediless. In *Konn* v. *Laird*, 460 F.2d 1318, 1319 (7th Cir. 1972), although the remedy there was mandamus, the court expressly held that:

> "It has long been recognized that the failure of the Army to follow its own regulations is a violation of due process...."

And where a violation of due process has resulted, courts have *long* upheld the right of a member of the military to an award of monetary relief against a commanding officer.

Dinsman v. *Wilkes*, 12 How. 389, 53 U.S. 414 (1851) was "an action by a marine against his commanding officer for punishment inflicted upon him for refusing to do duty in a foreign port upon the ground that the time of his enlistment had expired, and that he was entitled to his discharge." The marine had apparently been beaten and imprisoned. Noting that "the case is one of much delicacy and importance as regards our naval service," the court held as to the liability of the commanding officer at 427:

> "For acts beyond his jurisdiction, or attended with circumstances of excessive severity, arising from ill-will or a depraved disposition, or vindictive feeling, he can claim no exemption."

The court went on to add at some length (53 U.S. at 429-30):

> "It was the duty of Captain Wilkes to maintain proper discipline and order among the officers and men under his command, and if a spirit of disobedience and insubordination manifested itself in the squadron, he was bound to suppress it; and he might use severe measures for that purpose, if he deemed such measures necessary. And if, in his judgment, the continued refusal of the plaintiff to do duty made it proper to confine him on shore, rather than on shipboard, in order to reduce him to obedience, or necessary as an example to deter others from a like offense, he was justified in so doing; and while he acted honestly and from a sense of duty, and with a single eye to the welfare of the service in which he was engaged, the law protects him. He is not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object.[1]
>
> But, on the other hand, he was equally bound to respect and protect the right of those under his command, and to cause them to be respected by others; to watch over their health and comfort; and, above all, never to inflict any severer or harsher punishment than he, at the time conscientiously believed to be nec-

[1] Counsel apologizes for the lengthy quotation but feels that the historical importance of *Dinsman* in the context of the issues in this case warrants such treatment.

essary to maintain discipline and due subordination in his ships. The most despotic powers with which law clothes him, for the time, and which are aboslutely necessary for the safety and efficiency of the ship, make it more especially his duty not to abuse it. And if, from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action.

This is not a case where the punishment alleged to have been inflicted was forbidden by law, or beyond the power which the law confided to him. For, in such a case he would be liable whatever were his motives. But the facts to be ascertained in this case is whether, in the exercise of that discretion and judgment with which the law clothed him for the time, and which is in the nature of judicial discretion, he acted from improper feelings, and abused the power confided to him to the injury of the plaintiff.

The case, therefore, turns upon the motive which induced Captain Wilkes to inflict the punishments complained of. And this question is one exclusively for the jury, to be decided by them upon the whole testimony. And the rule of law by which they must be governed in making up their verdict is contained in a single proposition. It is this:

If they believed, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then the plaintiff is not entitled to recover. But if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover."

See also, *Nixon* v. *Reeves*, 65 Minn. 159, 67 N.W. 989 (1896), and the analysis contained in *Crozman* v. *Callahan*, 136 F.Supp. 466 (D.C. Okla. 1955). Admittedly, there are a few cases in point, but those that are, point to liability.

The court in *Alvarez* v. *Wilson*, 431 F.Supp. 136, 145, weighed the two positions of absolute immunity of military officers versus protection of constitutional rights of black national minorities. The court stated that military personnel must be free to make decisions to carry out the mission of common defense. But it looked to the objective conditions. They were peacetime activity and lack of any wartime decisions. The court most aware of the great deprivation of rights that black people in this country suffer because of the racial and national discrimination stated:

> "No citation is needed to illustrate that a person who endures racial discrimination suffers a most serious deprivation of constitutional rights. We can think of no military purpose—either of discipline, nor order, nor readiness for combat—that would justify absolute immunity for racially discriminatory acts perpetrated by military officers." *Id.* at 146.

The court went on to hold that the defendants had a right to qualified immunity. That means if they were acting in good faith when they did the acts, then they are immune from civil liability.

> "The elements of good faith defense are that the defendants subjectively believed in good faith that their conduct was lawful, and that their belief was reasonable. The defendants' subjective state of mind and their motivations, then, are material facts. Generally, summary judgment is an inappropriate tool to determine these facts. It is difficult enough to reconstruct subjective motivations two years after the occurrence with the benefit of live witnesses who can be cross-examined. When there are conflicting affidavits which raise factual questions, it is impossible to do it by affidavit. *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 989 n.13, 47 L.Ed.2d 128 (1976); *Foster* v. *Zeeko*, 540 F.2d 1310 (7th Cir. 1976)...." *Id.* at 147.

The United States Supreme Court has recently held that

> "The single submission by the United States on behalf of the petitioners is that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitution-

> al rights and even if the violations were knowing and deliberate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it." *Butz* v. *Economou*, 46 U.S.L.W. 4952, 4954 (1978).

The same considerations are applicable here. One must concede that the defendants occupy positions which require the exercise of discretion. They do not perform only ministerial tasks. They do occupy positions of great responsibility which should command great respect, but for that reason, as the Supreme Court in *Dinsman* stated, "it is more especially his duty not to abuse it." 53 U.S. at 429.

The test of immunity is not simply that the defendants were in high places. All of the defendants were duty bound to follow federal statutes and naval regulations and not to abuse a person's constitutional rights, and in that respect, they would be hard-pressed to contend that they had the discretion to do otherwise.

Section 0702 of the Navy Regulations, 1973, expressly limits naval officers' discretion to that within the law and the rules and regulations of the Navy.

Likewise, naval regulations provide that there shall be no discrimination against members of the Navy on the basis of race, color, sex or national origin. OPNAVINST 1500.42A and OPNAVINST 5354.1.

The defendants knew that they had no basis to deny equal opportunity to jobs, to schools, to training, etc. to plaintiffs. In fact, they had every reason to know that they were required to provide equal treatment to the plaintiffs. Further, the defendants believed that they could teach plaintiffs a lesson through the use and abuse of their power. The naval regulations do not say that a naval person *may* not discriminate against a national minority. It states that they *shall* not discriminate. It is mandatory and failure to follow the regulations was a violation of due process, a violation of naval regulations and an abuse of the command functions and plaintiff's rights.

In addition, *Dinsman* indicates that there is liability where acts within a commanding officer's discretion are performed but are motivated by ill-will or malice. The ill-

will of the defendants is apparent from this abbreviated record.

The only defense that the defendants have is a qualified immunity which is akin to a claim of good faith. A motion to dismiss is not the proper basis for resolving this issue. It must be resolved by a trial on the merits.

IV

PLAINTIFFS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES AND HAVE NO FURTHER ADEQUATE REMEDY

As a general rule of law, administrative remedies provided by the military service must be exhausted prior to seeking relief in civil courts. *McGee* v. *United States*, 402 U.S. 479 (1971); *Sohm* v. *Fowler*, 365 U.S. 915 (1966). The reasons for requiring exhaustion are: (1) to prevent interference by the courts in matters which require the exercise of agency expertise, (2) to insure proper functioning of the Congressional administrative system, (3) to assure judicial efficiency. However, this doctrine is not inflexible and when the reasons supporting the doctrine are found inapplicable, the doctrine should not be applied blindly.

> "Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an Administrative Board. Mrs. Downen's complaint rests solely upon the resolution of her constitutional claim. Accordingly, Mrs. Downen was not barred from District Court through her failure to exhaust administrative remedies." *Downen* v. *Warner*, 481 F.2d 642, 645 (9th Cir. 1973).

First, defendants claim that plaintiffs have not filed a claim under Article 138. The law in this circuit is that where constitutional issues are involved, Article 138 remedies do not have to be exhausted. The courts are best equipped to handle constitutional issues. *Daigle* v. *Warner*, 490 F.2d 358 (9th Cir. 1973). See also, *Committee For GI Rights* v. *Callaway*, 518 F.2d 466 (5th Cir. 1975).

Second, the defendants contend that plaintiffs have not exhausted their remedies before the Board for the Correction of Naval Records. Defendants have not read the com-

plaint where it states that they have exhausted their administrative remedies. See page 16 of complaint. See also, Exhibits "A" and "B" attached hereto, which show that exhaustion is complete.

Third, defendants allege another remedy—under naval regulations—was not exhausted. Naval regulations provide four possible remedies. One is an action under Article 138; another is the Board for the Correction of Naval Records. The third is a request to a Congressman and the last is a complaint via the chain of command. See, OPNAVINST 5354.1A, Chapter IV(2). The first two have been complied with. See Exhibits "C" and "D" attached hereto and incorporated by reference. No answer has been received.

All remedies have been exhausted. It is time to have judicial review since it is constitutional issues that are involved here. They are violations of equal protection and of due process. Military officials are not expert in deciding constitutional issues, but they have had much experience in ignoring these rights. We must not allow this doctrine to stand in the way of resolution of these issues.

V

PLAINTIFFS HAVE STATED CLAIMS FOR RELIEF

A. Plaintiffs Have Stated a Claim Under 42 U.S.C. 1985.

The fourth argument of the defendants is that the complaint fails to state a claim under 42 U.S.C. 1985 because it is not adequate to allege a conspiracy in general allegations.

The law concerning motions to dismiss for failure to state a valid claim under Rule 12 of the Federal Rules of Civil Procedure is quite clear:

> "A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim...."

Des Isles v. *Evans*, 200 F.2d 614, 615 (5th Cir., 1954); *Millet* v. *Godchaux Sugars, Inc.*, 241 F.2d 264, 265 (5th Cir. 1957).

Actions under 42 U.S.C. 1985(b) must set out facts on which to base a claim that a constitutional right was violated. *Kamsler* v. *Zaslawsky*, 355 F.2d 526 (7th Cir. 1966). In *Baldwin* v. *Morgan*, 251 F.2d 780 (5th Cir. 1958), the court held that an allegation in a complaint that an order had been issued by the Public Service Commission and that custom and usage of compelling segregation existed, was a sufficient statement of facts under 42 U.S.C. 1985.

A plaintiff charging violation of his civil rights by a conspiracy is not required to list the place and date of defendants' meetings and a summarization of their conversations. It is not required that the evidence be pled. *Hoffman* v. *Halden*, 268 F.2d 280 (9th Cir. 1959). All that is required is a short and plain statement showing that the pleader is entitled to relief so as to avoid its dismissal., *Cocoran* v. *Yorty*,, 347 F.2d 222 (9th Cir. 1965) *cert. denied* 382 U.S. 966 (1966).

The landmark case involving 42 U.S.C. 1985 (3) is *Criffin* v. *Breckenridge*, 403 U.S. 88 (1971). There, the black plaintiffs alleged that the private white defendants had stopped the plaintiff's automobile on a public highway and had detained and had beaten them and their purpose was "to prevent said plaintiffs and other Negro Americans ... from seeking the equal protection of the laws and from enjoying the equal right, privileges and immunities of citizens under the laws." The Supreme Court in an opinion by Justice Stewart, found:

> "The complaint in this case alleged that the petitioners were traveling upon the federal, state and local highways in and about De Kalb, Kemper County, Mississippi. Kemper County is on the Mississippi-Alabama border. One of the results of the conspiracy, according to the complaint, was to prevent the petitioners and other Negroes from exercising their rights to travel the public highways without restraint in the same terms as the white citizens in Kemper County, Mississippi. Finally, the conspiracy was alleged to have been inspired by the respondents' erroneous belief that [the owner and driver of plaintiff's car] a Tennesseean was a worker for Negro civil rights. *Under these allegations it is open to the petitioners to*

> *prove at trial that their federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy* ... and had suffered from conduct that Congress may reach under its power to protect the right of interstate travel. 403 U.S. at 105-06.

The allegations in the plaintiffs' complaint are not unsimilar to the pleading of the facts in *Griffin* v. *Breckenridge, supra.* The 1985 claim does not merely "allege that the defendants 'conspired to deprive plaintiff of his right under the Constitution and laws' of the United States in violation of 42 U.S.C. Section 1985." See page 10 of defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss. Instead, it is preceded by one hundred twenty paragraphs of allegations of specific facts which show a denial of equal protection, discriminatory purpose and actions on the part of defendants. See pages 1 through 16 of plaintiffs' complaint.

B. A Cause of Action Arises Under the Fifth Amendment

Defendants can be sued directly for certain constitutional violations in a "*Bivens* action." *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) was an action by an individual against agents of the Federal Bureau of Narcotics alleging that they, while acting under color of federal authority, made a warrantless and unlawful entry of his apartment and without probable cause searched it and arrested him. The action was based upon the Fourth Amendment of the United States Constitution and 28 U.S.C. 1331(a).[2]

The complaint in *Bivens* set out that the plaintiff's arrest was "done unlawfully, unreasonably and contrary to law." The court expressly held that "the violation of [the Fourth Amendment] by a federal agent acting under color of his

---

[2] 28 U.S.C. 1331(a) provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

There is no question as to the jurisdictional amount.

authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." 403 U.S. at 389.

In this case, plaintiffs allege that they were harassed, abused and discriminated against in job assignments, schools, training programs, evaluations and discharges in violation of federal statutes and the regulations of the United States Navy, to which they are entitled to the same protection as anyone else, and all without due process of law. The only difference between *Bivens* and this case is that *Bivens* was an action under the Fourth Amendment while plaintiffs are suing under the Fifth Amendment.

There is nothing in 28 U.S.C. 1331(a) or *Bivens* that would limit "*Bivens*" actions to Fourth Amendment actions. The Supreme Court has held both the Fourth and Fifth Amendments equally applicable to the defendants. *City of Kenosha* v. *Bruno*, 412 U.S. 507, 516 (1973) (concurring opinion of Brennan and Marshall); *District of Columbia* v. *Carter*, 409 U.S. 418, 433 (D.C. Cir. 1973); *Obrien* v. *Brown*, 409 U.S. 1, 14 n.7 (1972) (dissenting opinion of Marshall).

A *Bivens* action may appropriately be brought under the Fifth Amendment against federal officers. *Vonder AHE* v. *Howland*, 508 F.2d 364, 372 (9th Cir. 1975); *Wounded Knee Legal Defense/Offense Comm.* v. *FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974); *Apton* v. Wilson, 506 F.2d 83, 96 (D.C. Cir. 1974); *States Marine Lines, Inc.* v. *Shultz*, 490 F.2d 1146, 1156-7, (4th Cir. 1974) (contains court's analysis of why *Bivens* remedy is equally applicable in both Fourth and Fifth Amendment situations). See also, *Butler* v. *United States*, 365 F.Supp. 1035 (D. Haw 1973) which allowed a damage claim against military officers for violating First Amendment rights.

The action which states a valid claim against the defendants is a proper pleaded *Bivens* action.

Plaintiffs were entitled to the same rights as any person under the Constitution and laws of the United States and in this case under the rules and regulations of the United States Navy. For violation of those rights which fall within the wording of the statutes and regulations, plaintiffs are entitled to relief.

VI
ABSOLUTE IMMUNITY IS QUESTIONABLE

The final argument of the defendants under the motion to dismiss argues for dismissal because of absolute immunity for exercise of judicial functions. See defendants' motion, pages 15-16. They argue that this involves the claim of plaintiff LEMONS against all defendants for the action at Article 15. Also it concerns the claim of plaintiff SHANNON against all defendant sfor the attempt to discharge him.

First, it is submitted that the defendant CHAPPELL who held the Article 15 proceeding does have an immunity from suits for damages only. However, the suit does not name CHAPPELL as a defendant in that cause of action. But even more important, plaintiff LEMONS alleges that the crux of his claim is a discriminatory evaluation for advancement. It was based on three areas of discrimination, two in job assignments and one in Article 15 action. So the claim is based on action other than the Article 15 claim. Also the party can still obtain "judicial review" of the action by the immune official to determine whether it was invalid under the *Economou* case.

Similar considerations exist for plaintiff SHANNON. As far as the discharge is concerned, only defendant CHAPPELL was involved. But his claim also rests upon discriminatory evaluations and threats. All are reviewable pursuant to *Economou* to determine if they are lawful or unlawful.

Thus, the claims for immunity only extend to CHAPPELL concerning the discharge for plaintiff SHANNON, but his actions are still reviewable.

VIII
DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT

Defendants filed ten affidavits from various members of the U.S.S. Decatur. They are dated from October 30, 1978 to November 9, 1978. They total thirty-seven (37) pages of

facts. They were all collected while the vessell was ported in San Diego prior to its leaving for duty in the Western Pacific on November 11, 1978.

The defendants' motion was mailed on November 22, 1978, and received by plaintiffs' counsel on Monday November 27, 1978. At that time the U.S.S. Decatur had left Hawaii for the Philippine Islands. It is impossible to get affidavits from the five defendants without taking a journey to the Philippine Islands to do so. Expenses would be prohibitive and the plaintiffs are unable to afford it. It would be even more difficult now since, according to the *San Diego Union* of December 31, 1978, the ship is now heading for the Straits of Malacca in connection with the situation in Iran. See Exhibits "E" and "F", attached hereto.

According to Rule 56 of the Federal Rules of Civil Procedure (Title 58) where it appears from the affidavit of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify opposition, the court may refuse the application or order a continuance. See, *Robins Construction Company* v. *United States*, 345 F.2d 610 (3rd Cir. 1965); *Willmar Poultry Company* v. *Morton-Norwich Products, Inc.*, 520 F.2d 289 (7th Cir. 1975) *cert. denied* 424 U.S. 915 (1975).

Plaintiffs' attorney has attempted to correspond with plaintiffs, but at this date has received no reply concerning these affidavits. See Exhibits "E".

A continuance is requested until the vessel returns in May of 1979.

CONCLUSION

For the preceding reasons, the motion to dismiss and for summary judgment should be denied, or in the alternative, plaintiffs should be allowed to amend their complaint and the motion for summary judgment continued.

Respectfully submitted,

JOHN MURCKO
Attorney for Plaintiffs

DATED: DECEMBER 31, 1978

DEPARTMENT OF THE NAVY
Board for Correction of Naval Records
Washington, D.C. 20370

trg
23 October 1978

John Murcko, Esquire
P. O. Box 8284
San Diego, CA 92102

Dear Mr. Murcko:

This refers to your interest in the cases of Navy Enlisted Members Cornelius Hickey, James Richardson, George Shannon and Vernon Wallace.

Allegations of racial discrimination and assignments to schools are matters under the cognizance of the Chief of Naval Personnel. Accordingly, the Board cannot taken jurisdiction of these cases at this time.

It is regretted that a more favorable reply cannot be made but the Board's procedures require that all administrative remedies be exhausted prior to acceptance by the Board.

Sincerely,

ROBERT D. ZSALMAN
Deputy Executive Director

Exhibit "A"

DEPARTMENT OF THE NAVY
Board for Correction of Naval Records
Washington, D.C. 20370

TRG:gam
26 October 1978
3463-78

EM3 Robert Lemons, USN
c/o Mr. John Murcko, Esquire
P.O. Box 8284
San Diego, CA 92102

Dear

Reference is made to your Application for Correction of Naval Record (DD Form 149) of 20 August 1978.

In accordance with the Board's standard practice, the records in this case were referred to the office within the Navy Department having cognizance over the subject matter addressed in your application for an advisory opinion relative to the issues presented therein. The enclosed letter was furnished in response to the Board's request. This opinion, which is advisory only and is not binding upon the board or the Secretary of the Navy, is forwarded for your information.

If you desire to submit any further statement or additional documentary material in support of your application, it is requested that you transmit same directly to this Board within the next 30 days.

In the event you find it inconvenient to respond within the 30-day period, kindly indicate prior to the termination of such period the approximate date that your reply will be forthcoming. If no response is received within the 30-day period, your case will be decided on the evidence of record as soon as a crowded docket will permit.

Sincerely,

ROBERT D. ZSALMAN
Deputy Executive Director

Enclosure

Exhibit "B"

DEPARTMENT OF THE NAVY
Bureau of Naval Personnel
Washington, D.C. 20370

In Reply Refer to
Pers-3Dc-VWK:bcj
454-74-1259
19 October 1978

MEMORANDUM FOR BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: LEMONS, Robert C., EM3, USN; comments and recommendations in the case of

Encl: (1) Pers-14 Memo of 18 October 1978
(2) BCNR File
(3) Subject's Microfiche Record

1. Enclosure (1) is forwarded herewith for consideration.

V. W. KIKTA
BUPERS/BCNR Coordinator

UNITED STATES GOVERNMENT
MEMORANDUM

Assistant for BCNR Matters (Pers3Dc)

DATE: 18 Oct 1978

Special Assistant for Legal Support (Pers-14)

Request for correction of records in the case of EM3 Robert C. LEMONS, USN, 454-74-1259; opinion concerning

(a) Pers-3Dc meno Pers-3Dc:VWK:bcj of 6 Oct 1978
(b) SNM's microfiche service record
(c) BCNR file on SNM
(d) 10 U.S.C. 1552
(e) 32 C.F.R. 723, BCNR Regulations
(f) Chapter XXVI, MCM, 1969 (Rev)
(g) BUPERSMAN 3410150

1. Reference (a) requested written comments and recommendations regarding SNM's request for correction of his records, taking into consideration current standards and policies.

2. SNM requests: (a) Removal from his service record of the nonjudicial punishment (NJP) imposed 19 July 1978 for violation of Art. 92, UCMJ-failure to obey a lawful order for which SNM was awarded a forfeiture of $50 pay for one month; and (b) that his report of Enlisted Performance Evaluation (NAVPERS 1616/5) dated 31 July 78 be corrected to reflect marks of 3.8 in each trait and that the "recommendation against advancement be changed to one for advancement".

3. SNM's sole basis for requesting the expungement of the NJP and changes in the NAVPERS 1616/5 is "because of racial prejudice on the part of the command of the USS DECATUR". A review of references (b) and (c) reveal no substantiating documents or explanation of SNM's assertion of racial prejudice.

4. Although the BCNR has the authority to grant the relief requested by SNM under references (d) and (e), it is recommended that the requested relief be denied. This recom-

mendation is based on the failure of SNM: (a) to exhaust all effective administrative remedies; and (b) to present sufficient relevant evidence to demonstrate the existence of probable material error or injustice. These latter two requirements are contained in Sections 723.3(c) and (e), respectively, of reference (e).

5. If SNM considered the NJP imposed unjust he should have, and may still, pursue an appeal under the provisions of reference (f). An appeal must be made "within a reasonable time" with 15 days after imposition of NJP considered reasonable. Since the NJP was imposed less than 3 months ago on 19 July 1978, a decision on the appeal may be pursued by SNM and perhaps a review will be granted. Further, should BCNR consider SNM's request absent an appeal, there is no evidence to substantiate SNM's claim of racial prejudice.

6. The Enlisted Performance Evaluation, dated 31 July 1978, appears to be correctly executed under reference (g) and is signed by SNM. Given SNM's request to upgrade all marks to 3.8 and change the recommendation for advancement must be rejected because of the lack of any evidence to substantiate his claim of racial prejudice in the execution of the document. SNM may submit a statement concerning the questioned Enlisted Performance Evaluation under reference (g). This statement must be sent via the SNM's commanding officer and the statement will be made part of the SNM's service record. SNM may also submit a statement for inclusion in his service record concerning the questioned NJP.

7. For the reasons stated above, it is recommended that the relief requested be denied.

R.J. MCCARTHY
Captain, JAGC, USN
Spec. Asst. for Legal Support

P.O. Box 8284
San Diego, Calif. 92102
August 27, 1978

Congressman Ronald Dellums
House of Representatives
Washington, D.C.

Dear Congressman Dellums:

With all respect and appreciation for special consideration to conduct a congressional investigation, I am one of five (5) crew members on board the U.S.S. Decatur (DDG-31) homeported in San Diego, California. We have been experiencing "great oppression, discrimination and harassment" from our chain of command. I myself and the others are Afro-Americans and out of the two (2) years I have served on board, it has not improved.

It is even worse. The highest ranking Black is an E-7 (Chief Petty Officer). Sir, this command has Ku Klux Klan activities in which they have made no attempt to resolve. I had to testify before Court about this activity and instead of getting better, it is getting worse for the minorities, excluding Filippino-Americans, (this I don't know why). We are not told of any chance of advancement, schools, etc. and out of 340 personnel (officer and enlisted) there is less than 10% Black, e.g., 20 Blacks, 4 Mexican-Americans.

Sir, the treatment on this commands needs to come to an end. Please consider my request on an adequate level.

Sincerely,

Vernon J. Wallace Jr.

Exhibit "C"

JOHN MURCKO
ATTORNEY AT LAW
861 SIXTH AVENUE (SUITE 806)
POST OFFICE BOX 8284
SAN DIEGO, CALIFORNIA 92102

November 13, 1978

AREA CODE 714
TELEPHONE 235-6921

Chief of Naval Personnel
Department of the Navy
ATTN: Captain McCarthy
Washington, D.C. 20370

RE: Vernon Wallace, Robert Lemons,
George Shannon, Cornelius Hickey,
James Richardson

Dear Sir:

Please be advised that I am writing to you concerning the intentionally discriminatory treatment afforded to the above five members of the U.S.S. Decatur by their command.

The discriminatory treatment is in job assignments, school assignments, rotation, promotion, evaluations, captain's mast, discharges and threats by the command against the five Black crew members.

Included are the following documents:

A. Statement of J. Richardson
B. Statement of V. Wallace
C. Statement of R. Lemons
D. Transfer Order of R. Lemons
E. Evaluation of V. Wallace
F. Evaluation of V. Wallace
G. Evaluation of V. Wallace
H. Complaint of Five Crew members

Would you please investigate these complaints and grant the necessary job promotions, assignments, school assignments, correct the evaluations, and correct the captains

mast and attempts for discharge. Also stop the discriminatory action aboard the U.S.S. Decatur by the Command by any means possible. Finally, please transfer the plaintiffs off of the vessel.

Please notify me of your intentions in this regard.

Sincerely,

John Murcko

JM/aem

Exhibit "D"

a-4 THE SAN DIEGO UNION Sunday, December 31, 1978

Connie' Voyage Called Routine

WASHINGTON (UPI)—The Navy yesterday dispatched a San Diego-based aircraft carrier and five support vessels toward the Malacca Straits on what it called "routine operations," the Department of Defense said.

A spokesman said the vessels included a guided missile cruiser, two guided missile destroyers and a conventional destroyer. The task group was supported by the Mispillion, a tanker and oiler.

"A U.S. Navy task group consisting of the USS Constellation, the USS Leahy, the USS Hoel, the USS Decatur, and the USS Kincaid has left Subic Bay in the Philippines and is proceeding into the South China Sea on routine operations," the Pentagon spokesman said.

Officials at the State Department said the task force has been ordered to proceed as far as the Malacca Straits between the Indonesian Island of Sumatra and Malaysia but no further toward the Persian Gulf.

The mounting turmoil in Iran and the growth of anti-American feeling forced a mass exodus by American, British and Dutch oil workers and their families duirng the weekend.

The Defense Department on Friday said a seven-vessel Middle East Task Force operating in the area south of the Persian Gulf was carrying out only routine naval maneuvers.

"It's certainly not a landing force," the Pentagon said.

Vessels in those waters fall under the command of the U.S. 7th Fleet operating in the Pacific Ocean.

DECLARATION

I, JOHN MURCKO, depose and say:

1. I am the attorney for the plaintiffs.

2. I received the motion for summary judgment on Monday, November 27, 1978, because of the Thanksgiving holiday.

3. The U.S.S. Decatur was in port at Naval Station, San Diego, California, until November 11, 1978. It was in port in Pearl Harbor, Hawaii from November 18, 1978 to November 27, 1978. It then left for the Philippines.

4. I am unable to go to the Philippines to obtain affidavits from plaintiffs because the plaintiffs cannot afford such expense. I also do not know where the ship presently is located. I have written to plaintiffs asking for replies to the ten statements on December 11, 1978. To this date, I have not received a reply.

5. The vessel will return to San Diego in May of 1979.

I declare under penalty of perjury that the preceding is true and correct.

Executed in San Diego, California, on December 31, 1978.

_____

JOHN MURCKO

Exhibit "F"

SUPREME COURT OF THE UNITED STATES

No. 82-167

George C. Chappell, et al., Petitioners,

v.

Vernon Wallace, et al.

ORDER ALLOWING CERTIORARI. Filed November 1, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-167

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

BRIEF IN OPPOSITION

JOHN MURCKO, Esq.

506 Fifteenth Street
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Oakland, California 94612
Telephone: (415) 465-2241

Counsel for Respondents

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No. 82-167

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

BRIEF IN OPPOSITION

The respondents respectfully request that this court deny the Petition for a Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 661 F.2d 729.

STATEMENT OF THE CASE

Respondents are all Black Americans who enlisted in the United States Navy and who were assigned to the Weapons, Supply and Engineering Divisions aboard the U.S.S. Decatur (DDG 31). The command of this landing ship is essentially made up of white officers and non-commission officers. On August 24, 1978 after years of discrimination by the petitioners, respondents filed suit in the United States District Court for the Southern District of California for unlawful discrimination by petitioners because of the color, race and nationality of the respondents. Respondents were discriminated against in the schools

they were allowed to attend. They were discriminatorily kept out of skilled ratings, and placed into the dirtiest and most dangerous assignments aboard the ship. They were also usually given poor quarterly marks and evaluations, were unlawfully processed for discharge and unlawfully given excessive punishment at Captain's Mast for minor transgressions.

Respondents were kept in a condition of servitude and dependency in violation of their constitutional rights to equal protection, and 42 U.S.C. §1985(3). As a result of the petitioners' malicious and discriminatory acts, respondents were not able to develop careers in the Navy and were unlawfully discharged. Respondents sought declaratory relief, money damages, and injunctive relief against the unlawful discrimination.

The district court for the Southern District of California, the Honorable Leland Neilsen, a former Navy Commander, granted a motion to dismiss the complaint for failure to exhaust remedies, for military immunity and for unreviewability of internal military decisions.

The United States Court of Appeal for the Ninth Circuit reversed the District Court on the basis that military decisions are reviewable if they involve a violation of a recognized constitutional claim and second that military officers enjoy a qualified immunity for acts committed incident to military service. But before the immunity does apply the court must apply the four Mindes factors to determine if the decision is reviewable. See page 18a of Appendix A attached to Petitioner's Petition for a Writ of Certiorari (hereafter Appendix A).

REASONS WHY THE WRIT SHOULD BE DENIED

The main agreement of the petitioner is that military officers and non-commissioned officers should enjoy absolute immunity for violation of the rights of servicemen and servicewomen. See Petition for Writ of Certiorari, page 14. All of their arguments concerning special factors counseling hesitation, alternative remedies to servicemen, reviewability, and a special relationship follow this argument.

But the United States Attorney seeks to extend the law of Feres v. United States, 340 U.S. 135 (1950) to all constitutional claims of service personnel. It would deprive service personnel of any constitutional rights by declaring that any violations of civil rights of service personnel by military officers or non-commissioned officers are immune from suit including damage actions and declaratory relief and injunctive relief.

1. The United States Supreme Court and numerous federal courts of appeal have held that internal military decisions are reviewable where they involve violation of constitutional rights.

Violations of Fifth and Sixth Amendment rights of service personnel at courts-martial are reviewable. Burns v. Wilson, 346 U.S. 137 (1953) (denial of right to counsel, due process rights of a fair trial, of a forced confession, of manufactured evidence, and of coerced witnesses); O'Callahan v. Parker, 395 U.S. 258 (1969) (denial of Fifth Amendment right to indictment by a grand jury and Sixth Amendment right to a jury trial); Relford v. Commandant, 401 U.S. 355 (1971) (denial of right to jury trial); Noyd v. Bond, 395 U.S. 683 (1969) (denial of due process by failing to follow federal

statutes and military regulations in post-court-martial review actions); Daigle v. Warner, 390 F.2d 358 (9th Cir. 1974) (denial of right to attorney at a summary court-martial); Mitchell v. Swope, 224 F.2d 365 (9th Cir. 1977) (right to counsel); Kaufman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969) (denial of right against self-incrimination and right to cross-examine witnesses); United States v. Augenblick, 393 U.S. 348 (1969).

Federal courts also have jurisdiction in suits by members of the military against their commanding officers for violation of their rights against unreasonable searches and seizures guaranteed by the Fourth Amendment. Committee for GI Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975) ("We recognize, of course that GIs are entitled to the protection of the Fourth Amendment as are all other American citizens."); Kaufman v. Secretary of the Air Force, 415 F.2d 991, 996 (D.C. Cir. 1969).

Jurisdiction also exists for suits by military personnel against their superiors for violation of their rights to freedom of speech and press guaranteed by the First Amendment. Parker v. Levy, 417 U.S. 733 (1974) (prohibiting the making of statements to other enlisted personnel concerning the Vietnam War); Brown v. Glines, 444 U.S. 348 (1960) (review of military decision for distribution of literature); Secretary of the Navy v. Averech, 418 U.S. 676 (1974) (prohibiting the distribution of literature to enlisted people); Committee for GI rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1974) (right to have posters in barracks); Huff v. Secretary of the Navy, 575 F.2d 907 (D.C. Cir. 1978) (Marine Corps enlisted enjoined their superior from prohibiting their distribution of petitions to Congress on the military base); Cortright v. Resor, 325 F.Supp. 797 (E.D.N.Y. 1971)

rev'd on other grounds, 447 F.2d 245 (2nd Cir. 1971) cert. denied 405 U.S. 965 (1972) (signing and circulating petitions); Yahr v. Resor, 431 F.2d 69 (4th Cir. 1970) cert. denied 401 U.S. 982 (1971) (distribution of literature on base); Dash v. Commanding General, 307 F.Supp. 849 (1969) aff'd per curiam 429 F.2d 427 (4th Cir. 1970) cert. denied 401 U.S. 981 (1971) (holding an open meeting on base).

Military personnel also can bring actions against their commanders for violations of their First Amendment right to be free of the attempts of the military to establish a religion. Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1971) (illegal to require servicemen to attend church services).

The court in Cortright v. Resor, 447 F.2d 245, 254-5, stated:

> "We are far from holding that under no circumstances could a civilian court interfere with a transfer order or prescribe other relief if that were needed to prevent abridgment of a soldier's first amendment rights."

See also, Friedman v. Froehlke, 470 F.2d 1351 (1st Cir. 1972); Hugh v. Seaman, 493 F.2d 298 (4th Cir. 1974); Miller v. Ackerman, 488 F.2d 920 (8th Cir. 1973) (denial of right to wear wig by commanding officer is arbitrary, irrational and unreasonable action).

The federal courts have recognized jurisdiction of suits by military personnel against their military superiors for violations of due process rights of servicemen at administrative hearing. Hagopian v. Knowlton, 470 F.2d 201 (2nd Cir. 1972) (denial of right to hearing); Wasson v. Trowbridge, 382 F.2d 807 (2nd Cir. 1967) (same); VanderMolen v. Stetson, 471 F.2d 617 (D.C. Cir. 1977) (denial of right to attorney, to notice, to call and to cross-examination of witnesses); Grimm v. Brown, 449 F.2d

654 (9th Cir. 1971) (denial of a "fair and impartial hearing"). Jurisdiction also exists when Navy officials fail to comply with their own regulations. Kimball v. Commandant, Twelfth Naval District, 482 F.2d 88 (9th Cir. 1970) (hardship discharge); Bluth v. Laird, 435 F.2d 1065 (4th Cir. 1970) (denial of deferment); United States ex rel. Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969); Feliciano v. Laird, 426 F.2d 424 (2nd Cir. 1971); Nixon v. Secretary of the Navy, 422 F.2d 934 (2nd Cir. 1970); Pitcher v. Laird, 421 F.2d 1972 (5th Cir. 1972).

Finally, we come to violations of equal protection as they are embodied in the due process clause of the Fifth Amendment. The United States Supreme Court held that jurisdiction exists in a suit by a naval lieutenant against his superiors concerning denial of due process and equal protection guarantees by failure to promote officers. The court had jurisdiction and decided the issue of equality of treatment by sex in an issue concerning members of the military. Schlesinger v. Ballard, 419 U.S. 498 (1975).

But even more important, in Alvarez v. Wilson, 431 F.Supp. 136 (N.D. Ill 1977) the court held that a black naval lieutenant can sue his naval superiors in an action for damages where the complaint alleged violation of constitutional rights under the Fifth Amendment for racial discrimination.

The petitioner would wipe all of these cases clean from the tableau rosa of history. This would result in the sterile declaration that service personnel have no constitutional rights, that military commanders can do what ever they please and that the executive department is free from the balance of power that was so precisely guarded by the courts since Marbury v. Madison, 1 U.S. 137 (1803).

Finally as the Court of Appeals below stated, "In addition, society as a whole has an interest in deferring federal officials from knowingly violating individuals' constitutional rights." Page 6a Appendix A.

Thus, the first argument of the petitioner concerning review of military decisions is without basis in law.

2. Under the decision of the Court of Appeals the review of the decision is so narrow that it is still an extreme disadvantage to service personnel and protects the discretion of military commanders.

The court stated that plaintiff must show a violation of a constitutional right and exhaustion of internal military remedies. Then and only then will the court apply a balancing test which includes the extent to which military functions and military discretion or expertise is involved. See Page 7a-8a of Appendix A.

This decision protects the military expertise and allows the courts to balance in favor of the military where it determines that military discretion is primary.

This is the same narrow test that was applied in other circuits. Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). In fact, the United States Supreme Court also appeared to use the balancing test in reviewing military decisions when it reviewed the military duty assignment in Brown v. Glines, 444 U.S. 348 (1980). There it recognized that service personnel do have a constitutional right to distribution of literature, but that prior approval must be obtained before circulating a petition on base. The balancing test was used there to protect the rights of service personnel and military discretion.

The Court of Appeal is following the precedents bequeathed to it by the high court in stating that

military decisions involving constitutional violations are subject to a limited review.

But the petitioners are attempting to change the law by eliminating review and by eliminating the balancing test from all military actions. This is an unwarranted attempt to turn back the clock and institute rule by fiat instead of rule by law.

3. The constitution does not warrant a grant of absolute immunity to military officials, officers and non-commissioned officers, for violation of constitutional rights, as the petitioners argue.

In Dinsman v. Wilkes, 53 U.S. 390 (1951) the Supreme Court held that military officials exercising discretion possess a qualified immunity from liability for damages. A Navy commander may never "inflict any severer or harsher punishment than he, at the time conscientiously believed to be necessary to maintain discipline and due subordination in his ships. The most despotic powers with which law clothes him, for the time, and which are absolutely necessary for the safety and efficiency of the ship, make it more especially his duty not to abuse it. And if, from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond which, in his sober judgment, he would have though necessary, he is liable to this action." Id. at 429.430.

Likewise, in Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682 (1949), this court held that actions by federal officers beyond their statutory power are ultra vires and may be the object of specific relief.

Also federal officers action which is exercised in a manner that is constitutional void can be made

the basis of a suit against the officer as an individual. Dugon v. Clark, 372 U.S. 609, 621-33 (1963). The purpose of the Civil Rights Acts and federal actions under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) is "to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position." Scheuer v. Rhodes, 416 U.S. 232, 243 (1974).

In its most recent decision the Supreme Court only allowed qualified immunity to federal officials from liability for damages in Bivens- type actions alleging constitutional violations. Butz v. Economou, 438 U.S. 478 (1978). In Economou, the Supreme Court referred to its opinion in Dinsman v. Wilkes, supra, which would indicate to the military service it would not preclude recovery. 438 U.S. at 492-494.

The doctrine of sovereign or absolute immunity only applies to the executive branch as a defense to civil damage suits for "defamation and kindred torts." Barr v. Matteo 360 U.S. 564, 569; to the members of Congress for speech, debates, reports or actions done in session. Ibid, and to the adjuciative session of judges. Pierson v. Ray, 386 U.S. 547 (1967).

There is no need for this absolute immunity to apply to routine military decisions in a non combat situation during peacetime. First, service personnel should not be treated as second class citizens and be denied all constitutional rights in the military service. It would impede the motivation of millions of service persons. Second, the limitation on the exercise of the discretion of the military officer is minimum. He has the protection of the Mindes factors. Also, he may bring a motion for summary judgment where there is no genuine issue of bad faith. Poller v. Columbia Broadcasting System, 368 U.S. 464 (196).

The petitioners do not enjoy sovereign immunity for violation of constitutional rights. Their actions are violations of the equal protection clause, federal statutes, and naval regulations outlawing discrimination. Their actions are also ultra vires. They only enjoy a qualified immunity.

4. Finally, the petitioners argue that this appears to be the first case in which servicemen have been allowed to seek damages for alleged constitutional violations incident to military service. See Petition for A Writ of Certiorari, page 15.

But this is a bold face distortion of the law. The United States Supreme Court in Dinsman v. Wilkes, 53 U.S. 414, 427, a case involving a Navy commander stated:

> "If they believed, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then the plaintiff is not entitled to recover. But if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover."

Money damages are available in racial discrimination cases brought against private citizens and state officials under 42 U.S.C. 1981, 1983 and 1985. Sullivan v. Little Hunting Park, Inc., 396 US. 229 (1969); McCrary v. Runyon, 515 F.2d 1082 aff'd, 427 U.S. 160 (1976).

An official is subject to an action for damages under the Fourteenth Amendment for racial discrimination. Maybanks v. Ingrahan, 378 F.Supp. 913 (D.C. Pa. 1974). Compensatory and punitive damages are allowed for violation of equal protection against federal officials. States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974).

Military commanders are personnally liable for violations of constitutionally protected rights of service personnel. Dinsman v. Wilkes, 53 U.S. 390; Alvarez v. Wilson, 431 F.Supp. 136 (N.D. Ill. 1977); Nixon v. Reeves, 65 Minn. 159; 67 N.W. 984 (1846); Crozman v. Callahan, 136 F.Supp. 466 (D.C. Okla. 1955).

CONCLUSION

The Petition for A Writ of Certiorari should be denied.

October 8, 1982

Respectfully submitted,

JOHN MURCKO
506 Fifteenth Street
Suite 300
Oakland, California 94612
Telephone: (415) 465-2241
Attorney for Respondents

No. 82-167

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

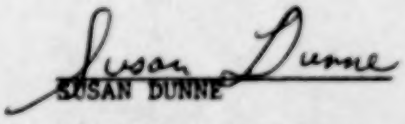
v.

VERNON WALLACE, et al.,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 1982, one copy of the Respondents' Brief In Opposition was mailed, postage prepaid to Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for petitioners. All parties required to be served have been served.



SUSAN DUNNE

506 Fifteenth Street
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NO. 82-167

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COMMANDER GEROGE C. CHAPPELL, et al

Petitioners,

v.

VERNON WALLACE, et al

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND DECLARATION IN SUPPORT THEREOF

JOHN MURCKO, ESQ.
506 15th Street, S. 300
Oakland, Cal. 94612
(415) 465-2241

Attorney For Respondent

No. 82-167

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners

v.

VERNON WALLACE, et al.,

Respondents.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondents VERNON WALLACE, ROBERT LEMONS, G. SHANNON, C. HICKEY, and JAMES RICHARDSON move this court for an order permitting them to proceed in this court, with an opposition to The Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit filed by the United States Solicitor General on July 30, 1982, and in support thereof attaches the following declarations of the respondents.

Respondents' opposition to the petition for writ of certiorari is being filed with this motion and appellant's declaration.

Dated: October 7, 1982

JOHN MURCKO, Esq.
506 15th Street, Suite 300
Oakland, CA 94612
(415) 465-2241

No. 82-167

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

DECLARATION OF CORNELIUS HICKEY IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

1. I, Cornelius Hickey, depose and say that I am one of the respondents in the above-entitled case, that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs, give security or to file printed briefs, I state that because of my poverty I am unable to pay the costs of said printed briefs or to give security thereof, that I believe that the decision of the United States Court of Appeal for the Ninth Circuit is without error and that the Supreme Court should not issue a Writ of Certiorari as prayed for by the petitioners.

2. I further swear that the responses to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

3. Are you presently employed? Yes. I am employed at the Mayflower Hotel, 405 Olive Way, Seattle, Washington, and earn $1,000. per month. I am also going to cooks school.

4. Have you received within the last twelve months any income from a business, profession, or other form of self employment or in the form of rent, interest, divdents or other source? No.

5. Do you have any cash or savings accounts or checkings accounts? I have $60 in savings.

6. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property? No.

7. List the persons who are dependent upon you for support and state your relationship to these persons. I furnish my mother Mrs. Hickey $150. per month.

8. My monthly expenses are listed below. My rent is $260, food $200, supportto my mother $150, telephone $60, utilities $50, tuition $90, books $60, transportation $60, clothing $70, and laundery $35.

I declare that the preceeding is true and correct. Executed in Oakland, California on October 8, 1982.

Cornelius Hickey
Cornelius Hickey
by John Mendes attorney in fact

State of California }
County of Alameda } ss.

On this the 8 day of October 19 82 before me,

Cynthia L. Gibbon

the undersigned Notary Public, personally appeared

John Mendes Attorney In Fact for Cornelius Hickey

OFFICIAL SEAL
CYNTHIA L. GIBBON
NOTARY PUBLIC - CALIFORNIA
COUNTY OF ALAMEDA
My Commission Expires August 28, 1985

☑ personally known to me
☐ proved to me on the basis of satisfactory evidence
to be the person(s) whose name(s) is subscribed to the within instrument, and acknowledged that he executed it.
WITNESS my hand and official seal.

Cynthia L. Gibbon
Notary's Signature

GENERAL ACKNOWLEDGMENT FORM 7110052
NATIONAL NOTARY ASSOCIATION • 23012 Ventura Blvd. • Woodland Hills, CA 91364

No. 82-167

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

DECLARATION OF JAMES RICHARDSON IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

1. I, James Richardson, depose and say that I am one of the respondents in the above-entitled case, that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs, give security or to file printed briefs, I state that because of my poverty I am unable to pay the costs of said printed briefs or to give security thereof, that I believe that the decision of the United States Court of Appeal for the Ninth Circuit is without error and that the Supreme Court should not issue a Writ of Certiorari as prayed for by the petitioners.

2. I further swear that the responses to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

3. Are you presently employed? Yes, I am presently employed by United States Postal Service, 902 Broadway, Nashville, Tennessee, and earn $1,200 per month.

4. Have you received within the last twelve months any income from a business, profession, or other form of self

employment or in the form of rent payments, interest, dividends, or other sources? No.

5. Do you own any cash or checking or savings account? No.

6. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property? Yes. I own a 1978 Fiat.

7. List the persons who are dependent upon you for support and state your relationship to these persons. I furnish $200 per month to my mother for support. Her name is Ruth Richardson.

8. List all of your expenses per month. My rent is $305, car payment is $135, food is $225, insurance is $50, auto repairs, gas and oil are $75, utilities are $30, telephone and dental are $50 and clothing is $75, and $200 for support.

9. I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury. Executed in Oakland, California on October 8, 1982.

James Richardson
JAMES RICHARDSON, Respondent
By John Munch
Attorney in Fact

State of California } ss.
County of Alameda }

On this the 8 day of October 19 82 before me,
Cynthia L. Gibbon
the undersigned Notary Public, personally appeared
John Munch, Attorney in Fact
for James Richardson

☒ personally known to me
☐ proved to me on the basis of satisfactory evidence
to be the person(s) whose name(s) is subscribed to the within instrument, and acknowledged that he executed it.
WITNESS my hand and official seal.

Cynthia L. Gibbon
Notary's Signature

OFFICIAL SEAL
CYNTHIA L. GIBBON
NOTARY PUBLIC - CALIFORNIA
COUNTY OF ALAMEDA
My Commission Expires August 25, 1985

GENERAL ACKNOWLEDGMENT FORM 7110552

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No. 82-167

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

DECLARATION OF ROBERT LEMONS IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

1. I, Robert Lemons, depose and say that I am one of the respondents in the above-entitled case, that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs, give security or to file printed briefs, I state that because of my poverty I am unable to pay the costs of said printed briefs or to give security thereof, that I believe that the decision of the United States Court of Appeal for the Ninth Circuit is without error and that the Supreme Court should not issue a Writ of Certiorari as prayed for by the petitioners.

2. I further swear that the responses to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

3. Are you presently employed? Yes, I am presently employed as a security guard at San Diego City Schools, 3550 Logan Avenue, San Diego, California. My salary is $601 per month. Also, I receive $348 from the Veterans Administration while attending school.

4. Have you received within the last twelve months any income from a business, profession, or other forms of self employment or in the form of rent payments, interest, dividends, or other sources? No.

5. Do you own any cash or checking or savings account? Yes. $10.00.

6. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property? Yes, a 1980 Chevrolet.

7. List the persons who are dependent upon you for support and state your relationship to these persons. I send $100 per month to my two daughters for support.

8. List all of your expenses per month. My rent is $225, car payment is $212, food is $100, utilities are $20, car insurance is $30, oil and gas and repairs are $100, monthly payment to Montgomery Wards is $20, and clothing is $25.

9. I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury. Executed in Oakland, California on October 8, 1982.

Robert Lemons
ROBERT LEMONS, Respondent
by John Mucko
Attorney in Fact

State of California
County of Alameda } ss.

On this the 8th day of October 1982, before me,
Cynthia L. Gibbon,
the undersigned Notary Public, personally appeared
John Mucko, Attorney in fact for
Robert Lemons,

☑ personally known to me
☐ proved to me on the basis of satisfactory evidence
to be the person(s) whose name(s) _____ subscribed to the within instrument, and acknowledged that he executed it.
WITNESS my hand and official seal.

OFFICIAL SEAL
CYNTHIA L. GIBBON
NOTARY PUBLIC - CALIFORNIA
COUNTY OF ALAMEDA
My Commission Expires August 22, 1985

Cynthia L. Gibbon
Notary's Signature

GENERAL ACKNOWLEDGMENT FORM 7119052

NATIONAL NOTARY ASSOCIATION • 23012 Ventura Blvd. • Woodland Hills, CA 913

No. 82-167

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners

v.

VERNON WALLACE, et al.,

Respondents.

DECLARATION OF VERNON WALLACE IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

1. I, Vernon Wallace, depose and say that I am the respondent in the above-entitled case, that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs, give security or to file printed briefs, I state that because of my poverty I am unable to pay the costs of said printed briefs or to give security thereof, that I believe that the decision of the United States Court of Appeal for the Ninth Circuit is without error and that the Supreme Court should not issue a Writ of Certiorari as prayed for by the petitioners.

2. I further swear that the responses to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

3. Are you presently employed? No. However, I am presently a student and receive $468.00 per month as a veteran. My last employer was Ultra Power, 8340 Highland View, Universal City, Texas where I was employed until December, 1981 at $1,000.00

per month.

4. Have you received within the last twelve months any income from a business, profession, or other forms of self employment or in the form of rent payments, interest, dividends, or other sources? No.

5. Do you own any cash or checking or savings account? No.

6. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property? No.

7. List the persons who are dependent upon you for support and state your relationship to these persons. My daughter, Puah Wallace.

8. List all of your expenses per month. My rent is $125, food $275, utilities $70, medical $120, auto expenses $150, school $100, insurance is $54, clothing is $75, babysitter is 120. My wife makes $600 per month.

9. I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury. Executed in Oakland, California on October 8, 1982.

Vernon Wallace
VERNON WALLACE, Respondent
by John Mendes
Attorney in Fact

State of California }
County of Alameda } ss.

On this the 8th day of October 19 82 before me,
Cynthia L. Gibbon
the undersigned Notary Public, personally appeared John Mendes, Attorney in Fact for
Vernon Wallace

☒ personally known to me
☐ proved to me on the basis of satisfactory evidence
to be the person(s) whose name(s) is subscribed to the within instrument, and acknowledged that he executed it.
WITNESS my hand and official seal.

Cynthia L. Gibbon
Notary's Signature

OFFICIAL SEAL
CYNTHIA L. GIBBON
NOTARY PUBLIC - CALIFORNIA
COUNTY OF ALAMEDA
My Commission Expires August 22, 1985

GENERAL ACKNOWLEDGMENT FORM 7116.052

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NO. 82-167

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, et al

Petitioners,

v.

VERNON WALLACE, et al

Respondents.

DECLARATION OF JOHN MURCKO IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR RULE No. 28

1. I, John Murcko, depose and say; that I am the attorneys for the respondents above listed.

2. I state on information and belief that Mr. George Shannon unable to pay any fees in the above case and should be allowed to proceed in forma pauperis. It is my belief that he is not employed, that he does not have any assets, and that his income does not exceed his expenses.

3. The last time that I saw George Shannon was in the fall of 1979. At that time he was destitute and had to leave his apartment at 2450 C Street, San Diego, California. He was discharged from the U.S. Navy, was unemployed, and was without any skills.

4. It is reasonable to assume that his financial condition has not improved. as is similiar to the other petitioners.

5. I had the enclosed brief and motion mailed first class postage, prepaid in Oakland, California on October 8, 1982

addressed to the Clerk, Supreme Court of the United States, Washington, D.C.. It was mailed before the due date of October 10, 1982.

I declare that the preceding is true and correct under penalty of perjury. Executed in Oakland, California on October 8, 1982.

John Murcko
JOHN MURCKO

State of California
County of Alameda } ss.

On this the 8 day of October 19 82 before me,
Cynthia L. Gibbon
the undersigned Notary Public, personally appeared
John Murcko

☒ personally known to me
☐ proved to me on the basis of satisfactory evidence
to be the person(s) whose name(s) is subscribed to the within instrument, and acknowledged that he executed it.
WITNESS my hand and official seal.

OFFICIAL SEAL
CYNTHIA L. GIBBON
NOTARY PUBLIC - CALIFORNIA
COUNTY OF ALAMEDA
My Commission Expires August 31, 1985

Cynthia L. Gibbon
Notary's Signature

GENERAL ACKNOWLEDGMENT FORM 7110 REV

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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-167

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, ET AL., PETITIONERS

v.

VERNON WALLACE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-167

COMMANDER GEORGE C. CHAPPELL,
ET AL., PETITIONERS

v.

VERNON WALLACE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

Respondents, like the court of appeals, begin from the premise that the issue in this case is whether a court may "review" a military decision. See Br. in Opp. 3; Pet. App. 4a, 16a n.9. Like the court below, respondents accordingly cite an array of cases dealing with military decisions (see Br. in Opp. 3-6; Pet. App. 5a). All but two of respondents' cases, however, involve some form of specific relief — a declaratory judgment, an injunction, or the setting aside of a military action — and not damages.

This case, by contrast, is a suit for damages, brought by servicemen against their superior officers in their personal capacities. The question presented is whether such suits, based on a cause of action implied directly under the Constitution, should be allowed. As we explained in the petition, it is obvious that the possibility of a suit for personal damages is more likely than a possible suit for some other

form of relief to cause officers to hesitate before ordering actions they believe necessary, and a serviceman's ability to threaten a personal damages action is, similarly, far more likely to undermine military discipline and the military chain of command. "It is almost axiomatic that the threat of damages has a deterrent effect * * * surely particularly so when the individual official faces personal financial liability." *Carlson* v. *Green*, 446 U.S. 14, 21 (1980) (footnote omitted).

The only two cases cited by respondents in which suits for damages were allowed to be brought against military officials are *Alvarez* v. *Wilson*, 431 F. Supp. 136 (N.D. Ill. 1977), and *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849), on writ of error after a new trial, 53 U.S. (12 How.) 389 (1851). As we noted in the petition (Pet. 15), the defendants in *Alvarez* have appealed the district court's decision to the Seventh Circuit. No. 81-2696. In *Wilkes*, the plaintiff alleged a common law tort (see 48 U.S. (7 How.) at 89, 121), not a constitutional violation. The question whether a damages remedy should be created directly under the Constitution was, therefore, not presented in that case. In addition, the plaintiff in *Wilkes* alleged that he was no longer a member of the armed forces when his commanding officer wronged him (see *id.* at 121; 53 U.S. (12 How.) at 402). Such an allegation, in certain circumstances, may permit civilian courts to intervene in military affairs to a greater degree. Compare *Schlesinger* v. *Councilman*, 420 U.S. 738, 759 (1975), with *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); compare *Feres* v. *United States*, 340 U.S. 135 (1950), with *United States* v. *Brown*, 348 U.S. 110 (1954).

Consequently, the court below remains the only appellate court to have held that servicemen may invoke an implied constitutional cause of action to threaten their superior officers with personal damages liability. Indeed, two cases decided subsequent to the filing of our certiorari petition emphasize the aberrant nature of the ruling below. See *Lombard* v. *United States,* No. 81-2261 (D.C. Cir. Sept. 14, 1982), slip op. 24-26; slip op. 1 (Ginsburg, J., concurring in part and dissenting in part); see also *Scales* v. *United States,* 685 F.2d 970, 973 (5th Cir. 1982).

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

OCTOBER 1982

DOJ-1982-10

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS

No. 82-167

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, ET AL.,
PETITIONERS

v.

VERNON WALLACE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

ROBERT E. KOPP
JOHN F. CORDES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether servicemen may sue their superior officers for damages for alleged constitutional violations incident to military service.

PARTIES TO THE PROCEEDING

The petitioners are Commander George C. Chappell, Lieutenant Commander Kenneth Viafore, Lieutenant Clarence Schultz, Lieutenant Barron Bianco, Lieutenant Kenneth Jordan, Engine Man Chief Richard McCannon, Internal Communications Chief David Lamser, and Mess Management Specialist Chief Lumberto Papa. The respondents are Vernon Wallace, Robert Lemons, Cornelius Hickey, James Richardson, and George Shannon.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-167

COMMANDER GEORGE C. CHAPPELL, ET AL.,
PETITIONERS

v.

VERNON WALLACE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 661 F.2d 729. The order of the district court (Pet. App. 22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1981, and a petition for rehearing was denied on March 2, 1982 (Pet. App. 21a). On May 24, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including July 16, 1982, and on July 2, 1982, Justice Rehnquist further extended the time in which to file a petition for a writ of certiorari to and including July 30, 1982. The petition was filed on ~~June~~ July 30, 1982, and was granted on November 1, 1982 (J.A. 73). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Respondents, black enlisted men in the Navy serving on board the U.S.S. *Decatur* (J.A. 3), brought this suit against petitioners, their superior officers on the *Decatur*, in 1978.[1] They sought $10 million in compensatory and punitive damages from petitioners, as well as declaratory and injunctive relief (J.A. 16-17).

Respondents claimed that, because of their race, petitioners mistreated them in a variety of ways. Specifically, respondent Shannon alleged in the complaint that one of the petitioners made him and other servicemen "clean the stove in the galley with toothbrushes," and "threatened * * * [to] strangle him with his bare hands for keeping the refrigerator door open" (J.A. 14). Respondent Shannon further alleged that he was given "a very low evaluation [that] * * * was totally unwarranted" (J.A. 15). Respondent Lemons complained that he "was constantly being assigned numerous tasks" by certain of the petitioners "even though there were numerous enlisted personnel who were not assigned tasks when they completed their old tasks," and that he was "assigned to perform * * * tasks * * * it was impossible to complete" (J.A. 8). Respondent Lemons also complained of having been fined $50 at Captain's Mast—an informal disciplinary proceeding—because he had

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[1] Petitioner Chappell was the Commanding Officer of the *Decatur*; petitioner Schultz, the Engineering Officer; petitioner Viafore, the Executive Officer; petitioner Jordan, the Operations Officer; petitioner Bianco, the Supply Officer; petitioner McCannon, the Chief of the Engineering Department; petitioner Lamser, the Chief of the Electrical Division; and petitioner Papa, the Chief of the Supply Department. J.A. 4-5.

left his clothes in his workspace instead of his locker (J.A. 9). Respondent Wallace asserted that he was unsuccessful in seeking various duty assignments to which, he claimed, he was entitled (J.A. 6). Respondent Hickey claimed that he was unjustly denied a recommendation for a promotion and an opportunity for certain schooling (J.A. 11). Respondent Richardson asserted that a white serviceman with less experience was given greater training opportunities (J.A. 13).

Each respondent alleged that the actions of which he complained "deprived [him] of his rights under the Constitution and laws of the United States, including the right not to be discriminated against because of his race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy" (J.A. 7; see J.A. 9, 11, 13, 15).[2]

2. The United States District Court for the Southern District of California dismissed the complaint, ruling that "public policy compels" that respondents' damages actions be barred by an "intra-service im-

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[2] Each respondent also alleged a conspiracy among certain of the petitioners "to deprive [him] of his rights under the Constitution and laws of the United States in violation of" 42 U.S.C. 1985. J.A. 8, 10, 12, 14, 16.

We note that several black servicemen on board the *Decatur*, including the ship's equal employment opportunity officer, not only did not join respondents' suit but filed affidavits in support of petitioners. Excerpt of Documents (filed in the court of appeals) 40-45.

munity" (Pet. App. 22a). The district court also ruled that the actions of which respondents complained were "nonreviewable military decisions" and that respondents had failed to exhaust their administrative remedies (*ibid.*).

The court of appeals reversed (Pet. App. 1a-20a). The court noted (*id.* at 2a n.1) that respondents, in seeking damages for alleged violations of the Constitution, were relying on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). But the court of appeals merely stated that "*Bivens* has been extended to fifth amendment equal protection claims" (Pet. App. 2a n.1, citing *Davis* v. *Passman*, 442 U.S. 228 (1979)) and did not address the question whether *Bivens* empowered the court to confer on servicemen an implied cause of action for damages against their superior officers.

Instead, the court of appeals principally discussed the "reviewability" of respondents' claims. The court defined "reviewability" as "whether a court may review a military decision to determine whether a substantive wrong has been committed" (Pet. App. 4a). In considering "reviewability," the court of appeals did not distinguish between *Bivens* suits—suits for damages brought against military officials in their personal capacity—and other litigation involving the military. Instead, the court stated that the question of "reviewability" would "arise regardless of the identity of the defendant, *i.e.*, whether the defendant is the United States or an individual federal official, and regardless of whether the remedy sought is damages or some form of non-monetary relief" (*ibid.*). The court of appeals acknowledged that "[l]itigation is potentially disruptive to military operations," that

"[p]ermitting litigation can make it difficult to maintain discipline," and that courts may "lack the competence to weigh the factors that might enter into a military decision" (*id.* at 6a). But, the court asserted, these "disadvantage[s] arise[] from the litigation itself," not from the identity of the defendant or the kind of relief sought (*id.* at 16a n.9). Consequently, the court of appeals stated, "[o]nce a claim has been found reviewable, allowing a damages remedy [will] not exacerbate * * * the disruption" (*ibid.*).

The court of appeals then held (Pet. App. 19a) that respondents' claims met the first criterion of "reviewability" because they alleged the violation of "a 'recognized' constitutional right" that "amount[ed] to more than a traditional state law claim" (*id.* at 10a). Beyond that, the court held that the reviewability of military decisions would depend on four factors (*id.* at 7a; emphasis omitted):

> (1) The nature and strength of the plaintiff's claim. * * * (2) The potential injury to the plaintiff if review is refused. (3) The extent of interference with military functions[,] * * * [although] interference per se should not preclude review because some degree of interference will always exist. (4) The extent to which military discretion or expertise is involved.

The court of appeals derived these factors from *Mindes* v. *Seaman*, 453 F.2d 197, 201-202 (5th Cir. 1971), which was not a *Bivens* action but a suit by a serviceman seeking declaratory and injunctive relief in connection with an allegedly erroneous performance evaluation. See 453 F.2d at 198. The court of appeals ordered the district court, on remand, to

assess the "reviewability" of respondents' claims by considering the four *Mindes* factors (Pet. App. 20a).[3]

The court of appeals also addressed the question whether petitioners are absolutely immune from damages liability. In keeping with its conclusion that imposing personal damages liability on individual officers presents no special concerns once a claim has been found "reviewable," the court of appeals stated that "the possibility that military operations will be disrupted, and the possibility of courts usurping military functions that they lack the competence to perform," are "inapplicable" to the inquiry into whether military officials should be subject to suit for damages (Pet. App. 16a n.9). The court did acknowledge that absolute immunity would avoid a "threat to discipline" that is created when military officers are subjected to potential monetary liability, but it considered this a "marginal benefit" insufficient to "offset the substantial policies opposing absolute immunity" (*id.* at 15a). The court of appeals then held that "except in unusual circumstances"—such as, possibly, when a suit challenged a military decision made in combat, or by an officer acting in a judicial or prosecutorial role—military officers would be accorded only a qualified, not an absolute, immunity from personal damages liability (*id.* at 14a, 16a-18a & n.10).

SUMMARY OF ARGUMENT

A. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),

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[3] The court of appeals also held that respondents were required to exhaust their administrative remedies, but it vacated the district court's decision that they had not done so here and instructed the district court to reconsider the issue (Pet. App. 3a n.2, 20a).

the Court ruled that it would, in some circumstances, provide a personal damages remedy for a constitutional violation even though Congress had not expressly authorized such relief. But *Bivens* and subsequent cases also held that a court should not create a damages remedy if there are "special factors counselling hesitation in the absence of" a clear expression of congressional intent to afford such a remedy (*id.* at 396).

The "peculiar and special relationship of the soldier to his superior" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)) is such a special factor. The relationship between Congress and the courts in the military area is radically different from their relationship in the civilian sphere; in particular, this Court has repeatedly recognized the distinctly subordinate role that courts play in regulating military life. The Court has accordingly been unwilling to allow any remedy that might interfere with military discipline unless Congress has authorized the remedy with unusual clarity. There is no indication that Congress intended to permit servicemen to seek damages from their superior officers. Moreover, to allow servicemen to sue their superiors for damages would seriously disrupt the hierarchical relationships that are unique, and essential, to the military.

B. The Court's unwillingness to expand the remedies Congress has provided for aggrieved servicemen is reflected in many areas. Under the Federal Tort Claims Act, the government is generally liable for the torts of its employees, and reasonable arguments can be made that Congress intended to allow servicemen to recover from the United States for the torts of other servicemen. Nevertheless, in *Feres* v. *United States*, 340 U.S. 135 (1950), the Court held that the demands of military discipline override these

indications of congressional intent and preclude servicemen's suits for service-related injuries. Similarly, the Court—because of the demands of military discipline, and in the absence of any express statutory requirement—has strictly limited the habeas corpus and injunctive relief available to servicemen.

C. A personal damages suit like respondents' is far more likely than any of these other remedies to disrupt military discipline. The comparison with the Federal Tort Claims Act is particularly instructive. The basis of *Feres* is that a suit by a serviceman against the government will present an unacceptable threat to military discipline because it will cause servicemen to testify against each other and force a civilian court to second-guess military decisions. These dangers are vastly greater when a serviceman seeks damages not from the government but from his superior officer personally.

1. Several aspects of military life make servicemen's personal damages actions against their superiors highly disruptive. The need for unhesitating, decisive action by a military officer is particularly great, far greater than for any ordinary civilian official; exposing an officer to prolonged litigation and the threat of ruinous personal liability at the hands of a subordinate will force him to hesitate before ordering an action that military discipline requires, but that a subordinate might resent.

Moreover, the danger of unwarranted personal damages actions is especially great in the military context. Unlike a civilian, a member of the armed forces is necessarily subject to a comprehensive regimentation that affects many aspects of his life. Such regimentation will inevitably give rise to complaints of unfairness. A small group of officers is often in

command of the same group of servicemen for an extended time; in these circumstances, any personality conflict or real or imagined grievance can spark a lawsuit. In addition, the military makes demands on its members that are "without counterpart in civilian life" (*Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975))—not only in combat, but in training and in the everyday development of the morale, discipline, and habits of obedience that are indispensable to an effective fighting force. These extraordinary demands create tensions not found in civilian life, particularly because servicemen may be unaccustomed to the unique traditions and requirements of the military.

2. Allowing a serviceman to bring a *Bivens* action against his superior will also intrude civilian judges and juries into military affairs. Civilian judges and juries will reexamine decisions made in a distinctively military context, often for reasons related to military discipline. In particular, a jury—which apparently has the power to award both punitive and compensatory damages in a *Bivens* action—will have to determine whether and to what extent a superior officer should be penalized for acting improperly toward his subordinates. Civilian courts and juries are not well suited to make this most difficult and delicate of military judgments.

The court of appeals' approach, which would permit a *Bivens* action if a serviceman states a "reviewable" claim, does not adequately deal with these concerns. The unpredictable balancing test the court employed to define "reviewability" does not enable officers to issue, decisively and without hesitation, orders that might be resented; and it places civilian courts in the position of deciding the extent to which military judg-

ment or military expertise entered into a particular officer's decision—precisely the decisions that civilian courts are not equipped to make.

3. Personal damages litigation is incompatible with military discipline in an even more fundamental respect. Military discipline depends upon the development of the reciprocal bonds of trust and mutual responsibility between a serviceman and an officer that make a serviceman willing to obey his superior instinctively, even at the cost of his life. The tensions and demands of military life are intended to help create this solidarity. But the ability of the armed forces to foster such relationships will be seriously impaired if a serviceman can view his superior as a potential defendant, capable of being brought before a civilian court and forced to account for his actions under the threat of massive liability. The attitudes and habits of thought that damages litigation encourages, while acceptable in many phases of civilian life, are inconsistent with proper military discipline.

Civil litigation for damages is, of course, not the only way to redress grievances, and Congress has provided several alternative remedies for servicemen. Respondents, for example, could have sought relief for most or all of their grievances before the civilian Board for the Correction of Naval Records. They also could have appealed up the chain of command for relief from the allegedly improper acts of their superiors; or they could have invoked the special and elaborate chain of command remedy the Navy has established for claims of racial discrimination. Officers guilty of racial discrimination are subject to court-martial and to penalties ranging from censure to imprisonment.

These remedies established by Congress and the Navy provide a means for a serviceman to obtain

relief from a superior who is truly arbitrary or discriminatory. But unlike a *Bivens* remedy created by a court, the remedies prescribed by Congress and the Navy preserve the chain of command instead of undermining it, maintain the coherence of the military community, and ensure that military judgments will be reviewed by persons familiar with the mores and traditions of the military.

4. The court of appeals considered the special dangers of personal damages actions against military officials only in connection with its discussion of petitioners' immunity. But the court did not address the special concerns raised by *servicemen's* damages suits against their superiors; nor did it recognize the extent to which the policies underlying the immunity doctrines suggest that such suits should be precluded. Moreover, the court of appeals wholly failed to consider the separation of powers problems raised by its decision to afford servicemen a personal damages remedy. Congress has broad power to create or deny a remedy even in the civilian context; in the military sphere, Congress's power is at its greatest, and a court departs from its proper role when it creates, without statutory authority, a remedy that interferes with military discipline.

ARGUMENT

A SERVICEMAN MAY NOT SEEK DAMAGES FROM HIS SUPERIOR OFFICERS FOR ALLEGED CONSTITUTIONAL VIOLATIONS INCIDENT TO MILITARY SERVICE

A. Introduction

Although the Constitution establishes rights, it does not in general specify the remedy for violations of those rights. Congress and the courts, therefore, must prescribe remedies for constitutional violations where

appropriate. But it is axiomatic, even in a civilian context, that unless the Constitution itself requires a particular form of relief, a federal court cannot provide a remedy unless it is authorized to do so, explicitly or implicitly, by statute. See, *e.g.*, *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448-449 (1850); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (Marshall, C.J.) ("[T]he power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law.").

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that federal law enforcement officers may be sued for damages for allegedly violating a citizen's Fourth Amendment rights. The Court specifically noted that it was not holding that the Constitution itself required the creation of this remedy (403 U.S. at 397), and no Act of Congress explicitly authorized such relief.

The Court nonetheless ruled that a court with general jurisdiction to entertain claims arising under the Constitution (see 28 U.S.C. 1331(a)) can provide a personal damages remedy against federal officials. See 403 U.S. at 396, quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); 403 U.S. at 405 (Harlan, J., concurring); *Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982), slip op. 27 (White, J., dissenting). The *Bivens* Court explained that a general jurisdictional statute can be a sufficient basis for an implied damages remedy because damages is a "remedial mechanism normally available in the federal courts" (403 U.S. at 397). Justice Harlan, in his concurring opinion, similarly reasoned that "a court of law vested with jurisdiction over the subject matter of a suit

has the power—and therefore the duty—to make principled choices among traditional judicial remedies" (403 U.S. at 408 n.8) and that "a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests" at stake in a suit such as *Bivens* (*id.* at 399). See also *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting) ("Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies * * *.").

The Court in *Bivens* recognized, however, that a grant of jurisdiction will not always be a sufficient basis for the judicial creation of a damages remedy for constitutional violations. *Bivens* suggested, and subsequent cases have established (see *Carlson* v. *Green*, 446 U.S. 14, 18 (1980); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979)), that the Court will not create such a remedy if there are "special factors counselling hesitation in the absence of affirmative action by Congress" (403 U.S. at 396)—that is, in the absence of some "affirmative" congressional action that reveals an intent to create a damages remedy more clearly than a general jurisdictional statute. See also *Nixon* v. *Fitzgerald*, *supra*, slip op. 22 n.37.

The "peculiar and special relationship of the soldier to his superiors" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)) is such a special factor. Military affairs are characterized by a relationship between the courts and Congress that is far different from the relationship prevailing in the civilian sphere. In the military context, the Court has always been reluctant

to accord a remedy that Congress has not expressly authorized. "Traditional judicial remedies" that are "familiar" and "normally available in the federal courts" to civilians are often not available to servicemen seeking relief for alleged wrongs related to military service. Specifically, the Court's decisions reflect the principle that it will not accord a remedy that may interfere with the relationship between a serviceman and his superior, or that may endanger military discipline, unless Congress not only has taken "affirmative" action but has clearly authorized such a remedy. Consequently, whatever the justification for viewing this Court's decisions subsequent to *Bivens*—*Davis* v. *Passman*, *supra*, and *Carlson* v. *Green*, *supra*—as establishing a presumption in favor of implied damages relief for constitutional violations in the civilian context, there is no justification for extending that presumption to suits between servicemen and their superiors.

Congress has not clearly or affirmatively authorized personal damages suits by servicemen against their superior officers for constitutional violations. Moreover, such suits disrupt proper military relationships and subvert military discipline. For essentially these reasons, every court of appeals that has considered the issue—except the court below—has refused to allow a serviceman to sue his superior officer for damages for a constitutional violation. See, *e.g.*, *Jaffee* v. *United States*, 663 F.2d 1226, 1235 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982) ("[S]uits based on service injuries involve, as a general matter, 'special factors counseling hesitation.' "); *Rotko* v. *Abrams*, 455 F.2d 992 (2d Cir. 1972), aff'g and adopting 338 F. Supp. 46, 48 (D. Conn. 1971); *Laswell* v. *Brown*, 683 F.2d 261, 268-269 (8th Cir.

1982) petition for cert. pending, No. 82-5574 (filed Oct. 19, 1982); *Bailey* v. *DeQuevedo*, 375 F.2d 72 (3d Cir.), cert. denied, 389 U.S. 923 (1967); *Sigler* v. *LeVan*, 485 F. Supp. 185, 189-192 (D. Md. 1980), appeal dismissed, Nos. 80-1160 and 80-1202 (4th Cir. Apr. 29, 1980). See also *Lombard* v. *United States*, 690 F.2d 215, 226-227 (D.C. Cir. 1982); *Scales* v. *United States*, 685 F.2d 970, 973 (5th Cir. 1982); *Thornwell* v. *United States*, 471 F. Supp. 344, 347-348 (D.D.C. 1979); *Misko* v. *United States*, 453 F. Supp. 513, 515 (D.D.C. 1978), aff'd, 593 F.2d 1371; *Birdwell* v. *Schlesinger*, 403 F. Supp. 710, 718 (D. Colo. 1975); *Roach* v. *Shields*, 371 F. Supp. 1392, 1393 (E.D. Pa. 1974); *Calhoun* v. *United States*, 604 F.2d 647 (9th Cir. 1979), aff'g and adopting 475 F. Supp. 1, 4 (S.D. Cal. 1977), cert. denied, 444 U.S. 1078 (1980); *Hass* v. *United States*, 518 F.2d 1138, 1142-1143 (4th Cir. 1975); *Bailey* v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965). For the same reasons, this Court should not permit implied constitutional damages actions by servicemen against their superiors.

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B. This Court Has Not Expanded The Remedies Prescribed By Congress For Servicemen Alleging Wrongs Connected To Military Service

The Constitution gives Congress the power "[t]o raise and support Armies," "[t]o provide and maintain a Navy," "[t]o make Rules for the Government and Regulation of the land and naval Forces." Article I, Section 8, Clauses 12-14. These powers are "broad and sweeping" (*United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)), and it is well established that, in the regulation of the military, the role of the courts is decidedly subordinate to that of Congress. "[P]erhaps in no other area has the Court accorded Con-

gress greater deference. * * * Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981). "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (emphasis omitted).

In view of these constitutional principles, it would plainly be inappropriate for courts to exercise the same freedom to create remedies in the military sphere as they do in other contexts. Servicemen have invoked a variety of statutes—not only general jurisdictional provisions, but also the Federal Tort Claims Act and 28 U.S.C. 2241, which authorizes habeas corpus relief—in efforts to gain relief from alleged wrongs incident to military service. Far from creating remedies when Congress has been silent, this Court has repeatedly declined to provide any remedy that might interfere with military discipline, even when reasonable arguments might be made that Congress specifically authorized the relief sought by the serviceman.

Under the Federal Tort Claims Act, for example, the government is liable for the torts of its employees in a wide range of cases. See 28 U.S.C. (& Supp. V) 1346(b) and 2671 *et seq.* Congress specifically included "members of the military or naval forces" in its definition of "[e]mployee of the government" (28 U.S.C. 2671), thus revealing that it expected the torts of military officials to give rise to liability in

some contexts. Moreover, the FTCA contains several express exceptions, including an exception for "combatant activities of the military or naval forces * * * during time of war" (28 U.S.C. 2680(j)). The FTCA contains no express exception for torts committed by one serviceman against another. Cf. *Carlson* v. *Green*, *supra*, 446 U.S. at 20 (applying maxim of expressio unius to FTCA).

In *Feres* v. *United States*, 340 U.S. 135 (1950), the Court nonetheless held that the FTCA does not permit servicemen to sue the United States for service-related injuries. The principal basis of *Feres* was the " 'peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance of such suits on discipline' " (*United States* v. *Muniz*, 374 U.S. 150, 162 (1963), quoting *United States* v. *Brown*, 348 U.S. at 110, 112 (1954). See also *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977). The Court ruled that these concerns overrode the contrary indications of congressional intent to allow servicemen's tort suits (see 340 U.S. at 138-139). *Feres* is firmly established law; the Court has recently reaffirmed it (*Stencel Aero Engineering Corp.* v. *United States*, *supra*), and Congress not only has left *Feres* untouched for over 30 years while amending the FTCA in other respects (see *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Flood* v. *Kuhn*, 407 U.S. 258, 282-283 (1972)) but has expressly indicated its approval of the *Feres* doctrine (see, *e.g.*, H.R. Rep. No. 97-384 (Pt. I), 97th Cong., 1st Sess. 5 (1981)).

Similarly, the Court—acting in the absence of any express congressional mandate and on the basis of its concerns about military discipline—has given a narrow interpretation to the scope of federal habeas

corpus relief available to servicemen. The rules of collateral estoppel apply far more stringently to a serviceman challenging a court-martial conviction than to a state prisoner challenging his conviction, even though there is no express statutory basis for such a distinction. See *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (plurality opinion) ("[W]hen a military decision has dealt fully and fairly with an allegation raised in [a habeas corpus] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. * * * It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims."). Indeed, the Court's affirmation of these limits on military habeas corpus occurred at almost the same time as its expansion of federal habeas corpus relief from state convictions. Compare *ibid.* and *Hiatt* v. *Brown*, 339 U.S. 103 (1950), with *Brown* v. *Allen*, 344 U.S. 443 (1953); see P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1538 (2d ed. 1973) ("Prior to *Hiatt* v. *Brown*, *supra*, most lower courts assumed that the widening range of habeas review in civilian cases was equally relevant to military cases"). The Court's principal reason for limiting the scope of military habeas corpus review in this way was again the "overriding demands of discipline and duty." *Burns* v. *Wilson*, *supra*, 346 U.S. at 140.

The habeas corpus relief available to a serviceman is also strictly limited when he is challenging not a court-martial conviction but some other military decision. For example, even if a service is statutorily obligated to provide certain drafted servicemen—such as doctors—with a particular duty classification,

"it is not within the power of [the] Court by habeas corpus to determine whether specific assignments to duty fall within the [required] basic classification" (*Orloff* v. *Willoughby*, 345 U.S. 83, 93 (1953)). The reason for this limitation, the Court explained, is that "there must be a wide latitude allowed to those in command. * * * [W]e have found no case where this Court has assumed to revise duty orders as to one lawfully in the service[, and] * * * [i]t is not difficult to see that the exercise of such jurisdiction * * * would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." *Id.* at 93-95.

Finally, the Court has limited the ability of servicemen to obtain injunctive relief for alleged wrongs, including constitutional violations. In *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), a serviceman—suing, like respondents, under 28 U.S.C. 1331(a)—sought to enjoin court-martial proceedings on the ground that the court-martial lacked jurisdiction to hear the charge against him. This Court ruled that federal district courts generally "must refrain from intervention, by way of injunction or otherwise" in court-martial proceedings. 420 U.S. at 758. The basis of this holding was not primarily the historic limits on equitable relief (see *id.* at 755) or the requirement that administrative remedies be exhausted (see *id.* at 757); instead, the Court relied principally on the special status of the military and "military exigencies" (*id.* at 757-758) as its reasons for declining to afford equitable relief. See also *Gilligan* v. *Morgan*, *supra* (that a requested injunction would require judicial supervision of a State National Guard is a factor making the claim nonjusticiable). Notably, the Court in *Councilman* expressly equated the "vital

role" of the military with the constitutionally-based "demands of federalism" that justify a similar preclusion (see *Younger* v. *Harris*, 401 U.S. 37 (1971)) of suits to enjoin state prosecutions. See *Carlson* v. *Green*, *supra*, 446 U.S. at 19 (A defendant's "independent status in our constitutional scheme * * * suggest[s] that judicially created remedies * * * might be inappropriate.").

In sum, the Court has held that a variety of remedies—damages relief against the government, as well as the more traditional remedies of habeas corpus and injunction—either are not available in the military context, or are available only in strictly limited circumstances. These decisions reflect the principle that the relationship between Congress and the courts is radically different in the military context, and in particular that the Court will be reluctant to afford a remedy that may interfere with the relationship between a serviceman and his superior or undermine military discipline—even in those instances where Congress has arguably authorized such a remedy. It follows a fortiori that the Court should be unwilling to create an implied remedy in the absence of any explicit congressional authorization, when the remedy will seriously disrupt military order.

C. Damages Actions By Servicemen Against Their Superiors Are Particularly Disruptive Of Military Discipline

Respondents' *Bivens* actions seek $10 million in compensatory and punitive damages from individual naval officers. Of all the remedies that a serviceman might invoke, a personal damages action of this sort is obviously the most likely to disrupt military discipline and the command relationship.

1. In *Feres* v. *United States*, as we have noted, the Court held that servicemen may not bring damages

actions against the United States. The Court was principally "concern[ed] with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 676 (Marshall, J., dissenting), quoting *United States* v. *Brown, supra,* 348 U.S. at 112. See *United States* v. *Muniz, supra,* 374 U.S. at 162. The Court specifically noted that "[t]he trial [of such a claim] would * * * involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 673.

These concerns are incomparably greater when a serviceman, instead of seeking damages from the United States, "hale[s] his superiors into court" as defendants and threatens them with massive personal liability. See *Carlson* v. *Green, supra,* 446 U.S. at 21 (threat of personal liability has a greater impact on officials' behavior than the possibility that the government will be held liable); *Owen* v. *City of Independence,* 445 U.S. 622, 653 n.37, 655-656 (1980) (same); *Jaffee* v. *United States, supra,* 663 F.2d at 1234. Such a lawsuit pits members of the armed forces directly against each other in court. Commanding officers will be in the position of defending not only their actions but their own financial well-being against the attacks of those they are responsible for commanding. If "the effect of [an FTCA] action upon military discipline" (*Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 673) justified the Court in precluding an FTCA action against the United States—in spite of the colorable argu-

ments that Congress intended to allow such suits—surely servicemen should not be allowed to seek damages from their superior officers personally, in the absence of a strong indication that Congress favors such a remedy.

Personal damages actions would disrupt military discipline for a number of reasons. Even an officer who is confident that he is acting lawfully will know that if he issues an order that his subordinates are likely to resent, he risks prolonged litigation with its financial and psychological burdens and the threat of massive personal liability. See *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 13. While these risks confront many public officials, the costs of forcing military officers to hesitate before issuing commands that their subordinates dislike are particularly great. The central feature of military life is that "the right to command and the duty to obey ordinarily must go unquestioned" (*Brown* v. *Glines*, 444 U.S. 348, 357 (1980)). "No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *In re Grimley*, 137 U.S. 147, 153 (1890). See also *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22 (1955) ("[W]ithin the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order."); *Falbo* v. *United States*, 320 U.S. 549, 554 (1944); *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30-31 (1827) (Story, J.) (allowing officers to be sued for actions in the line of duty "would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation"). Whatever the virtues or dangers of encouraging other public officials to be cautious, it is the particular respon-

sibility of military officials to command, and undue hesitancy or trepidation on their part is wholly unacceptable. "[C]ommand indulgence of an undisciplined rank and file can decimate a fighting force." *Parker* v. *Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J., concurring).

In addition, the distinctive characteristics of military life make the danger of unwarranted damages actions especially great. See *Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 670 ("[T]he relationship between a sovereign and the members of its Armed Forces is unlike any relationship between private individuals."). Civilians generally are subject to the discretionary acts of government officials only on occasion; by contrast, the armed forces regulate, on a continual basis, "aspects of the conduct of members of the military which in the civilian sphere are left unregulated." *Parker* v. *Levy*, *supra*, 417 U.S. at 749. *See Middendorf* v. *Henry*, 425 U.S. 25, 38 (1976) ("the difference between the diverse civilian community and the much more tightly regimented military community"). As this Court has explained (*Parker* v. *Levy*, *supra*, 417 U.S. at 751):

> [T]he * * * relationship of the Government to members of the military * * * is not only that of lawgiver to citizen * * *. [U]nlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one. * * * [W]ithin the military community there is simply not the same autonomy as there is in the larger civilian community.

Such comprehensive regimentation—which no one can deny is an essential aspect of military life—will inevitably give rise to complaints of unfairness. See

Orloff v. *Willoughby*, *supra*, 345 U.S. at 93-94. It takes little ingenuity to translate such a complaint into a constitutional claim. Moreover, a small group of officers will often be in command of the same group of servicemen for an extended time. Those officers are responsible for each serviceman's living conditions, career advancement, working conditions, discipline, duty assignments, training regime, and performance evaluations, as well as for many other matters of great importance to the serviceman. Especially on a ship, they will be in constant and close contact. In these circumstances, any personality conflict or real or imagined grievance can easily spark a lawsuit. Both the complaint and declarations filed by respondents in this case, for example, reveal that respondents have a wide range of grievances, ranging from those that, if true, are serious to those that are unquestionably petty. See pages 2-3, *supra*; J.A. 28-29.

In addition to the comprehensiveness of military discipline—and as important a source of litigation if *Bivens* actions are allowed in the military context—is the extraordinary nature of the demands that the military places on servicemen. "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, *supra*, 420 U.S at 757. For this reason, the Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society. * * * [T]he military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies

to fight or be ready to fight wars should the occasion arise.' " *Parker* v. *Levy*, *supra*, 417 U.S. at 743, quoting *United States ex rel. Toth* v. *Quarles*, *supra*, 350 U.S. at 17. See also *Department of the Air Force* v. *Rose*, 425 U.S. 352, 367 (1976), quoting *Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94 ("[T]he miliary * * * 'constitutes a specialized community governed by a separate discipline from that of the civilian' ") ; *Burns* v. *Wilson*, *supra*, 346 U.S. at 140.

It is in combat, of course, that servicemen are subject to the most dramatic demands. In training exercises, as well, servicemen may be required to take extraordinary physical risks. But "[l]oyalty, morale, and discipline are essential attributes of *all* military service," and "those restrictions necessary for the inculcation and maintenance of basic discipline and preparedness are as justified on a regular base in the United States as on a traning base or a combat-ready installation in the Pacific" (*Brown* v. *Glines*, *supra*, 444 U.S. at 356-357 n.14 (emphasis added; citations omitted)).

The extraordinary demands that military life, in all its aspects, places on servicemen, will inevitably give rise to tensions not found in nonmilitary contexts. See *Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94 ("Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots."). Moreover, commanding officers, who are responsible for insisting on military discipline, frequently must deal with servicemen who are unaccustomed to "the longstanding customs and usages of the services" (*Parker* v. *Levy*, *supra*, 417 U.S. at 746-747) and the "laws and traditions governing [military] discipline" (*Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 757). The military must "ingrain

* * * reflexes" (*Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 368); the habit of automatic obedience that will lead a serviceman to risk his life in combat cannot be taught through the ordinary educational methods of civilian life. Servicemen will, therefore, be required to follow procedures and to adopt routines that may strike a civilian as quite arbitrary but that are, in the judgment of military officials, important in instilling the habits that create an effective fighting force. See also *Parker* v. *Levy*, *supra*, 417 U.S. at 763 (Blackmun, J., concurring) ("The subtle airs that govern the command relationship are not always capable of specification.").

For all of these reasons, if servicemen are granted an implied constitutional damages remedy against their superiors, unwarranted personal damages suits are likely to be common. Indeed, as we noted in the petition, servicemen are bringing *Bivens* actions against their superiors with increasing frequency (see Pet. 16 n.11 (citing cases)). The likely result is that military officers, whose responsibility it is to command and to act decisively, will be hesitant.

2.a. Allowing servicemen to bring *Bivens* actions will also undermine military discipline by intruding civilian judges and juries (see *Carlson* v. *Green*, *supra*, 446 U.S. at 22-23) into military affairs. As we discuss (see pages 32-35, *infra*), Congress has provided alternative remedies for servicemen who raise claims like respondents'; those remedies enable military officials, or civilians with expertise in military affairs, to address servicemen's service-related grievances, subject to limited judicial review. But in a *Bivens* suit, a civilian judge and jury will necessarily be required to "second-guess[] military orders" (*Stencel Aero Engineering Corp.* v. *United States*,

supra, 431 U.S. at 673).[4] They will have to reexamine decisions made in a distinctively military context, often for reasons that are related to military discipline and are "without counterpart in civilian life" (*Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 757). See also *Noyd* v. *Bond*, 395 U.S. 683, 694 (1969) ("[M]ilitary decisions * * * must accommodate the demands of individual rights and the social order in a context which is far removed from * * * the ordinary run of civilian litigation."); *Sutton* v. *Johnstone*, 99 Eng. Rep. 1215, 1243 (1786) (Lord Mansfield) ("A military tribunal is capable of feeling all the[] circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature?").

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[4] The court of appeals required that a serviceman exhaust his military remedies before bringing a constitutional damages action. See Pet. App. 7a, 10a. Respondents have not challenged this requirement in this Court, and we agree that, if servicemen are to be permitted to bring *Bivens* actions, they should first be required to exhaust military remedies. See, *e.g.*, *Schlesinger* v. *Councilman*, *supra*; *Noyd* v. *Bond*, 395 U.S. 683 (1969); *Gusik* v. *Schilder*, 340 U.S. 128 (1950). While the military remedies will not enable plaintiffs to recover everything they might seek in a *Bivens* action, a complaining serviceman may be satisfied by the relief he receives through the administrative procedures, and the dispute may therefore be settled without resort to litigation.

Nonetheless, if a serviceman were not satisfied by the relief he obtained through military channels, and persisted in his *Bivens* suit, the trial of his claim would necessarily require a judicial reexamination of military decisions and orders. See also *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 399, 421-422 (1966).

In this case, for example, a jury would have to consider such questions as whether respondents' performance in certain military specialties was properly evaluated, and whether the minor disciplinary actions allegedly taken against some of the respondents—such as ordering one to help clean a stove with a toothbrush—were justified by the special needs of military discipline. It is most unlikely that civilian courts and jurors are qualified to make these judgments. See *Butz* v. *Economou*, 438 U.S. 478, 503 (1978), citing *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, *supra*, 403 U.S. at 409 (Harlan, J., concurring) (in deciding whether to create a *Bivens* remedy, a court must consider "whether the courts are qualified to handle the types of questions raised by the plaintiff's claim"). Moreover, there is no reason to believe that in enacting a general jurisdictional statute, Congress—which has "repeatedly * * * recognized" (*Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 757) that the military "constitutes a specialized community" (*Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94)—intended to authorize civilian courts and juries to play this role in military life.

In addition, respondents are in effect asking a civilian court and jury to punish petitioners—their superior officers—for petitioners' actions toward them. Respondents seek punitive damages (see *Carlson* v. *Green*, *supra*, 446 U.S. at 21-22), and even an award of compensatory relief has a deterrent purpose and a punitive effect (see, *e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 256-257 (1978)). Few questions are more vital to military discipline than whether and to what extent a superior officer should be punished for a particular action toward a serviceman; not only is it difficult to assess the propriety of the officer's actions,

but maintaining a correctly balanced relationship between an officer and a serviceman—in which the officer demonstrates his commitment to the serviceman's well-being in a way that elicits the serviceman's instinctive obedience—is of crucial importance to the military.

This Court has repeatedly emphasized that civilian courts should take care not to interfere with internal military determinations concerning the discipline to impose on a member of the armed forces for actions that jeopardize military interests. See, *e.g.*, *United States ex rel. Toth* v. *Quarles*, *supra*, 350 U.S. at 18; *Burns* v. *Wilson*, *supra*, 346 U.S. at 140. Such a determination—particularly when it concerns an officer's actions toward a subordinate—is surely an excellent example of the " 'complex, subtle, and professional decisions as to the composition, training, * * * and control of a military force' " about which this Court has said, " '[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence.' " *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 65-66, quoting *Gilligan* v. *Morgan*, *supra*, 413 U.S. at 10. Congress could not have intended that a grant of general jurisdiction would give civilian courts and juries the power to make such a determination and then, if they decide that the officer has acted improperly, to levy what amounts to a crushing fine. As the Court has cautioned (*Orloff* v. *Willoughby*, *supra*, 345 U.S. at 93-94):

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be con-

sidered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.

b. Plainly the court of appeals' approach—which would grant a serviceman a *Bivens* remedy if he stated a "reviewable" claim—does not adequately deal with these concerns. The court of appeals would allow servicemen to threaten their superior officers with damages liability; the officer would know whether the suit was barred only after a court had applied a complex and inherently unpredictable balancing test that essentially permits it to consider every relevant factor. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one that results in widely varying applications by the courts, is little better than no privilege at all."). However many suits the court of appeals' reviewability criteria actually preclude, those criteria are poorly designed to provide officers with the degree of assurance they need to issue commands unhesitatingly in an environment that inevitably creates a degree of fear and resentment.

Moreover, the court of appeals' criteria would be applied by a civilian court; a civilian court would decide "[t]he extent to which military discretion or expertise is involved" in a decision, and "[t]he extent of interference with military functions" if a *Bivens* action is allowed—subject to the court of appeals' admonition that "interference per se should not preclude review because some degree of interference will always exist" (Pet. App. 7a; emphasis omitted). As we have said, however, it is these very determinations that civilian courts are not equipped to make. "Military functions" differ fundamentally from their apparent civilian counterparts, and "military expertise" enters into officers' decisions in ways that civilians are unlikely fully to understand.

3.a. Personal damages litigation is wholly incompatible with military discipline in an even more fundamental way. Military discipline is not simply a matter of a superior officer imposing his will on subordinates. Instead, the object of military discipline and training is to develop the reciprocal bonds of trust that make a serviceman willing to obey his superior instinctively, even at the cost of his life. The military's "internal law of command and obedience invests the military officer with 'a particular position of responsibility.' * * * Within this discipline, the accuracy and effect of a superior's command depends critically upon the specific and customary reliability of subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior." *Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 367-368 (footnote omitted), quoting *Parker* v. *Levy*, *supra*, 417 U.S. at 744. See *In re Grimley*, *supra*, 137 U.S. at 153 ("Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other.").

Allowing personal damages litigation between servicemen will significantly impair the ability of the armed forces to foster these relationships. As we have said, military life inevitably creates tensions and imposes burdens on servicemen. These tensions will not be resolved in a way that gives rise to the necessary bonds of obedience and mutual responsibility if servicemen are permitted to view their superiors as potential defendants, capable of being brought before a civilian court and forced to account for their actions under the threat of massive liability. The availability of civil litigation encourages certain attitudes and habits of thought—that a superior's orders are sub-

ject to challenge, review, and second-guessing; that a superior can be called to account, at the behest of a subordinate and on almost any matter, before outside authorities who do not share the military perspective;[5] and that a serviceman can impose serious inconvenience on a superior and effectively threaten him with financial ruin. While comparable attitudes toward authority may or may not be acceptable in civilian life, merely to describe these attitudes is to demonstrate their incompatibility with military discipline.

Civil damages litigation is only one "particular private remedy for alleged misconduct"; it may be precluded in certain contexts "in order to advance compelling public ends." *Nixon* v. *Fitzgerald, supra*, slip op. 25. "[I]t is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Id.* at 22 n.37. Just as certain incidents of adversary criminal procedure are not suited to the military (see *Ex parte Quirin*, 317 U.S. 1, 40 (1942)), so the attitudes spawned by the availability of adversary civil litigation for damages are inconsistent with the proper relationship between a military superior and his subordinates. See *Middendorf* v. *Henry*, 425 U.S. 25, 35-37 (1976), citing *In re Gault*, 387 U.S. 1 (1967) (comparing certain military proceedings to juvenile proceedings).

b. We emphasize in this connection the remedies that Congress has specifically prescribed for servicemen with grievances like respondents'. First, the

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[5] See *Jefferson* v. *United States*, 178 F.2d 518, 520 (4th Cir. 1949), aff'd *sub nom. Feres* v. *United States, supra* ("[E]ssential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit.").

Board for the Correction of Naval Records, which is composed of civilians appointed by the Secretary of the Navy, provides a forum in which a serviceman is entitled to challenge, among other things, an allegedly discriminatory performance evaluation or promotion decision. See 10 U.S.C. (& Supp. V) 1552. The Board may hold a hearing on a serviceman's claim, and if it denies the claim it must provide the serviceman a statement of its reasons. See 32 C.F.R. 723.3 (e)(2), (4), (5), 723.4, 723.5. Congress has vested the Secretary of the Navy, acting through the Board, with plenary power to "correct an error or remove an injustice" (10 U.S.C. (& Supp. V) 1552(a)); in appropriate cases the Board may issue orders leading to a retroactive promotion or an award of back pay. See 10 U.S.C. 1552(c). Board decisions are subject to judicial review and can be set aside if they are arbitrary and capricious or not based on substantial evidence. See, *e.g.*, *Grieg* v. *United States*, 640 F.2d 1261 (Ct. Cl. 1981), cert. denied, 455 U.S. 907 (1982); *Thornton* v. *Coffey*, 618 F.2d 686, 692 (10th Cir. 1980); *Knehans* v. *Alexander*, 566 F.2d 312, 315 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978).

Another, even more comprehensive military remedy is Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938, which provides that "[a]ny member of the armed forces who believes himself wronged by his commanding officer," and who is denied relief by that officer, "may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made." See 10 U.S.C. 822. The officer exercising general court-martial jurisdiction "shall examine into the complaint," and is authorized to "take proper measures

for redressing the wrong complained of * * *." This chain of command grievance procedure enables a serviceman to challenge even actions that are not reflected in military records. Congress has also provided that servicemen who consider informal disciplinary actions taken under 10 U.S.C. 815—such as the $50 fine imposed on respondent Lemons—to be "unjust or disproportionate" may "appeal to the next superior authority," and the appeal "shall be promptly forwarded and decided" (10 U.S.C. 815(e)). The superior officer may mitigate the punishment or set it aside. 10 U.S.C. 815(d) and (e).

The armed forces have devoted special attention to racial discrimination. The Navy, for example, requires each command to establish a Human Relations Council that includes representatives of the ethnic and racial groups within the command, and has assigned a full-time equal opportunity assistant to each command; the assistants and councils consider problems relating to discrimination and advise commanders on the effectiveness of their antidiscrimination and affirmative action efforts. Office of the Chief of Naval Operations, Department of the Navy, *Equal Opportunity Manual* II-1 to II-3 (1978). The Navy also specifically enjoins all forms of discrimination,* requires the reporting of racial incidents, and provides a chain of command procedure for the consideration of servicemen's complaints of discrimination (*id.* at IV-1 to IV-2; V-1 to V-2). An officer who discrimi-

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* The *Equal Opportunity Manual* specifies, for example (at II-10), that "[c]ommanders should not attempt to avoid any unpleasantness or friction with local citizens through practices such as segregating shore patrol teams [or] assigning minority service members to shore patrol duty only in minority sections of town * * *."

nates against his subordinates or otherwise mistreats them can be punished, by court-martial if appropriate, under any of several Articles of the Uniform Code of Military Justice (10 U.S.C. 892, 893, 933, 934) and subject to penalties ranging from censure to imprisonment.

These remedies established by Congress and the Navy, unlike the *Bivens* remedy created by the court of appeals, preserve the military chain of command. If officers act wrongfully toward servicemen, they are subject to discipline imposed by *their* military superiors. The military remedies provide a means for servicemen to gain relief from an arbitrary or discriminatory act by a superior officer, but they do so in a way that does not disrupt the internal coherence of the military community or subvert the hierarchical relationships that are essential to military discipline. The Corrections Board provides a civilian forum—although one familiar with the mores of the military (see *Noyd* v. *Bond*, *supra*, 395 U.S. at 694)—in which a serviceman will be able to seek relief for almost any significant grievance, and its decisions are subject to judicial review. While some servicemen would undoubtedly prefer to seek large damages awards from their superior officers, there is no reason to doubt that the remedies established by Congress and the military will provide adequate relief for legitimate complaints of unlawful conduct.

4. The court of appeals considered the special dangers of personal damages litigation only in connection with its discussion of petitioners' immunity. See Pet. App. 4a, 16a n.9. For a number of reasons, its consideration of these dangers was inadequate. First, the court of appeals did not distinguish between damages suits against military officials brought by ser-

vicemen and damages suits brought by civilians. Cf. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). As we have explained, suits brought by servicemen are an especially great threat to military discipline, and the policy considerations supporting an absolute bar against such suits are particularly compelling.[7] The Court has said that public officials will be accorded an absolute immunity if they exercise "special functions" (*Harlow* v. *Fitzgerald*, *supra*, slip op. 7; *Butz* v. *Economou*, *supra*, 438 U.S. at 507), and the functions of military commanders are without parallel in our society: their commands require strict and immediate obedience, and they must prepare their subordinates for, and often subject them to, extraordinary risks. Moreover, military commanders' functions are central to the protection of the national security. See *Harlow* v. *Fitzgerald*, *supra*, slip op. 11 & nn.18, 19. It is therefore particularly important to protect them "from undue interference with their duties and from potentially disabling threats of liability" so as to ensure "the unhesitating performance of functions vital to the national interest" (*id.* at 5, 11).

For these reasons, the court of appeals erred in failing to recognize that the policies underlying immunity doctrines also strongly oppose the imposition of damages liability on military officers for acts taken in their official capacity, at least in suits brought by

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[7] For this reason, in this case, unlike *Davis* v. *Passman*, *supra*, 442 U.S. at 246, and *Carlson* v. *Green*, *supra*, 446 U.S. at 19, the special factors counselling hesitation in according *servicemen* a damages action against military officials are far broader than—not "coextensive" with—the officials' immunity against *all* personal damages actions challenging their official acts.

servicemen. Indeed, these policies, in addition to counselling against the creation of a *Bivens* remedy, can be understood to justify an absolute immunity protecting military commanders from their subordinates' suits for damages; several courts have ruled that servicemen's suits against their superior officers are precluded by an "intra-military immunity." See, *e.g.*, *Laswell* v. *Brown*, *supra*, 683 F.2d at 262, 268-269; *Thornwell* v. *United States*, 471 F. Supp. 344, 347-348 (D.D.C. 1979); *Misko* v. *United States*, 453 F. Supp. 513, 515 (D.D.C. 1978), aff'd, 593 F.2d 1371 (D.C. Cir. 1979). See also *Hass* v. *United States*, 518 F.2d 1138, 1142-1143 (4th Cir. 1975); *Bailey* v. *DeQuevedo*, 375 F.2d 72 (3d Cir.), cert. denied, 389 U.S. 923 (1967). The terminology is unimportant: whether the question is viewed as one of immunity or of the appropriateness of a *Bivens* remedy, these courts, unlike the court of appeals, have correctly recognized that the special concerns arising in the military context require that servicemen not be allowed to sue their superior officers for damages.

The more fundamental defect in the court of appeals' approach, however, was its failure to consider the separation of powers problems raised by its decision to accord servicemen a personal damages remedy against military commanders. See *Harlow* v. *Fitzgerald*, *supra*, slip op. 5 n.10, 19 n.36 (distinguishing between question whether an implied right of action for damages should be created and immunity question); *Butz* v. *Economou*, *supra*, 438 U.S. at 486, 503 (same). Congress has broad power to create or preclude remedies for constitutional violations. See, *e.g.*, *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 250 (1845); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exer-*

cise in Dialectic, 66 Harv. L. Rev. 1362, 1366-1367 (1953). As we have shown (see pages 15-20, *supra*), the primacy of Congress in creating remedies is greatest in the military context, and the Court has been unwilling to allow any remedy that might interfere with military discipline or undermine the command relationship, even when an Act of Congress arguably permitted that remedy. Congress has given no indication that it intended to grant servicemen a personal damages remedy against their superiors;[8]

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[8] Indeed, Congress did not extend Title VII of the Civil Rights Act of 1964 to the military. *Johnson* v. *Alexander*, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978). Title VII provides comprehensive administrative and judicial remedies for racial discrimination in federal employment (see 42 U.S.C. (& Supp. IV) 2000e-16), but certain features of those remedies, including de novo judicial review (see *Chandler* v. *Roudebush*, 425 U.S. 840 (1976)), obviously are incompatible with military requirements, for the reasons we discuss in the text.

Respondents have claimed damages under 42 U.S.C. 1985(3). It is questionable whether that statute, passed during Reconstruction, was meant to apply to federal officials. Compare *Mack* v. *Alexander*, 575 F.2d 488, 489 (5th Cir. 1978), with *Gillespie* v. *Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980). Moreover, the court of appeals, following this Court's approach to 42 U.S.C. 1983, a similar, broad remedial statute (see *Butz* v. *Economou*, *supra*, 438 U.S. at 500-501, 504), held that respondents' claim under 42 U.S.C. 1985(3) would be governed by the same principles that apply to implied constitutional causes of action. See Pet. App. 8a-9a n.5. In any event, in light of the Court's decision in *Feres* that Congress did not intend the Federal Tort Claims Act to permit servicemen to sue the government for damages, it is wholly implausible to suggest that Congress intended Section 1985(3)—which, unlike the FTCA, reflects no indication whatever of congressional intent to permit servicemen's suits—to be the basis of far more disruptive suits by servicemen against individual officials.

instead, it has established remedies that have a structure fundamentally inconsistent with that of a *Bivens* remedy. By assuming that respondents may bring a *Bivens* action and considering instead the question of petitioners' immunity from damages liability, the court of appeals obscured the extent to which courts depart from their proper role when they create, in the military context, a remedy that interferes with military discipline. See *Burns* v. *Wilson*, *supra*, 346 U.S. at 140 (footnote omitted):

> [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

For similar reasons, *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 83 (1849), on writ of error after a new trial, 53 U.S. (12 How.) 389 (1851)—on which both the court of appeals (Pet. App. 5a, 13a) and respondents (Br. in Opp. 8, 10-11) relied—is of limited relevance to this case. In *Wilkes*, the plaintiff alleged a common law tort (see 48 U.S. (7 How.) at 89, 121), not a constitutional violation. The question whether a damages remedy should be created under the Constitution was, therefore, not presented in that case. Moreover, *Wilkes* arose at a time when the armed forces were far smaller, and when Congress had not addressed the question of how to remedy servicemen's grievances and had not established the elaborate alternative remedial schemes that were available to respondents. In those circumstances, there was far more justification for a court to allow a civil damages action, based on ancient com-

mon law principles, to go forward. The court of appeals, by contrast, created a *new* remedy, unauthorized by Congress, in the context of a large standing military, carefully regulated by Congress and the Executive Branch, in which the problems of maintaining order and discipline are proportionately greater, and in which servicemen are far more likely to resort to litigation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 395429 1234

Office-Supreme Court, U.S.
FILED
FEB. 28
1983
ALEXANDER L. STEVAS,
CLERK

No. 82-167

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE C. CHAPPELL, *et al.*,
Petitioners,

v.

VERNON WALLACE, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Do Black enlisted personnel in the United States Navy have the right to equal protection, as embodied in the Due Process Clause of the Fifth Amendment, by 42 U.S.C. 1985(3) and by Naval regulations to be free of racial discrimination from their superior officers and the remedy to enforce that right?

2. Does a United States District Court have jurisdiction to review the violations of 42 U.S.C. 1985(3), of naval regulations and of the equal protection rights of Black enlisted personnel by the racially discriminatory actions of their superior officers?

3. Do naval officers and non-commissioned officers enjoy a qualified good faith immunity from injunctive relief, declaratory judgment and money damages for intentional discriminatory action against Black enlisted personnel?

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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the following constitutional provisions, rules, and regulations:

United States Constitution, Article I, Section 1
United States Constitution, Article I, Section 8
United States Constitution, Article III, Section 2
United States Constitution, Amendment V
28 U.S.C. 1331(a)
28 U.S.C. 1343
28 U.S.C. 1391
42 U.S.C. 1985(3)
OPNAV INSTRUCTION 5354.1a (See Appendix to the Brief of Respondents)

STATEMENT OF THE CASE

The respondents are five Black enlisted men formerly stationed aboard the U.S.S. Decatur (DDG 31), who brought this action to stop the blatant racial discrimination exercised against them by the petitioners, their superior officers. The treatment and actions of these officers imposed unconscionable and unmistakable violations of the rights guaranteed to the respondents by the Fifth Amendment Due Process and Equal Protection provisions to be free of intentional and invidious racial discrimination.

The jurisdiction of the federal district court was invoked to enjoin petitioners from denying respondents skilled rates, training for skilled ratings, advancement in ratings, honorable discharges, and unfair treatment in non-judicial punishment; to enforce the naval regulation prohibiting racial discrimination in the treatment of and opportunities available to Black enlisted personnel, and for damages for acts of intentional discrimination by the petitioners and for declaratory relief. (J.A. 16-17)

The jurisdiction of the federal court was invoked due to the clear and substantial violations of the respondents' constitutional rights. The Board for the Correction of Naval Records refused to review the claims. (J.A. 63-69) Furthermore, a Congressional representative and the Chief of Naval Personnel refused to take any action (J.A. 57, 68-70) To redress these issues of constitutional law, statutory law and regulations so that respondents would not suffer irreparable harm by the action of the petitioners in terminating respondents' naval careers, the federal court was called upon to adjudicate these issues.

FACTS

The respondents, Lemons, Richardson and Shannon enlisted in the U.S. Navy in 1975, Wallace enlisted in 1976, and Hickey enlisted in 1977. All of the respondents except for Lemons have unskilled ratings. Hickey, Richardson and Shannon are messmen; Wallace is a seaman, while Lemons is a third class electrician. (J.A. 3-4)

The respondents were transferred to the U.S.S. Decatur on various dates between 1976-1978. Hickey, Richardson and Shannon were transferred to the Supply Department, Wallace went to First Division (Deck) and Lemons went to the Engineering Department.

The officers aboard the U.S.S. Decatur were all white. (J.A. 5) Of the 340 officer and enlisted personnel on the vessel, only 20 were Blacks, including respondents. (J.A. 68) While aboard the vessel, respondents suffered severe racial discrimination in ratings, school assignments, rotation, promotion, evaluations, non-judicial punishment, discharges and threats of physical violence. (J.A. 6-18) This caused respondents great indignity as American citizens and as members of the Black race.

In October 1977, respondent Wallace completed the course for Operations Specialists and was transferred from the Deck Department to the Operations Intelligence (OI) Division to

apply for a skilled rating as an Operations Specialist. He was certified by the Professional Development Board and the OI Division Officer. Nevertheless, the Operations Officer and the Commanding Officer (Chappell), based on their intent to keep Blacks, like Wallace, outside the OI Division, refused to allow Wallace to remain in OI Division. Instead, they transferred Wallace to the unskilled Deck Division to chip paint and wash the bulkheads. OI Division included no Blacks as of July, 1978 (J.A. 6-7)

Respondent Wallace was repeatedly threatened, humiliated, insulted and abused by the petitioners. When he protested the inequality of treatment of Blacks on the U.S.S. Decatur, the threats and vituperative action of the petitioners increased. Graffitti extolling the Ku Klux Klan and demeaning Blacks would appear on a regular basis on the bulkheads and washrooms of the ship. No attempts were made to identify or to discipline those perpetrators of racism aboard the ship. In May, 1978 while deployed to Hawaii, a rope was made in the shape of a noose (known to symbolize the KKK) and was left hanging in Wallace's workspace, right in front of his superior officers. (J.A. 27-29)

Respondents Lemons was subjected to unequivocal racial discrimination by petitioners Schultz, McCannon, Lamser and Viafore, who intentionally lowered Lemons quarterly evaluations and prohibited him from taking the examination for advancement to petty officer-second class. This evaluation resulted from two factors: (1) Lemons was assigned more tasks than were possible to complete, and (2) he was punished by petitioners when he could not complete them. (J.A. 10) This occurred in 1977-1978.

Lemons was exposed to a serious fire and explosion risk when the petitioners made him work in the main control and engineering room where the switchboard was highly unstable and when the force draft blower was broken down.

Respondent Hickey was subjected to racial discrimination in job assignments by petitioners Chappell, Viafore, Bianco and

Papa from July 10, 1977 to August, 1978. Hickey had more experience and schooling than two white messmen in the Supply Department who were sent to the records school and were recommended for the recording clerk position. Also two whites were recommended for messmen petty officer positions by petitioners even though Hickey had an excellent work record, more experience and more schooling. (J.A. 10-11)

Then, in October 1978, petitioner Bianco threatened to transfer Hickey to Deck Division to chip paint and clean decks (one of the least skilled jobs on the ship) because of Hickey's actions in opposing racial discrimination on the U.S.S. Decatur. (J.A. 38)

Respondent Richardson was also discriminated against by the petitioners because of his race. In July, 1978, the petitioners sent two white seamen to records school and recommended them for positions as records clerks in Supply Department even though Richardson had more experience in Supply. (J.A. 13) Respondent Richardson was ordered to work in the galley with diesel fuel covering the galley deck by the petitioners who refused to abate the hazardous condition. (J.A. 26)

Finally, respondent Shannon was recommended for a less than honorable discharge as part of a clear and pervasive patter of racial discrimination in August, 1978. Shannon was given a low evaluation. His life was threatened by Bianco. The intentional policy of these superior officers was to conspire against Blacks to force them off the ship and out of the Navy with less than honorable discharges. (J.A. 15)

All of the respondents allege that these actions were a violation of their rights, privileges and immunities secured to them as American citizens and Black people, by the Fifth Amendment to the Constitution, a violation of 42 U.S.C. 1985(3) since petitioners engaged in an intentional conspiracy to deprive them of their rights to be free of racial discrimination guaranteed by the equal protection of the laws, and in violation of the Navy regulations OPNAV Instruction 5354.1a, Chapter II, Section 5, prohibiting racial discrimination in the Navy. (J.A. 2-17)

PROCEEDINGS BELOW

The respondents brought suit on August 24, 1978 in United States District Court for the Southern District of California where the U.S.S. Decatur was home ported, after exhausting their administrative remedies. The respondents sought injunctive relief to enjoin the petitioners: (1) from denying Black personnel skilled ratings, skilled training, and other opportunities for advancement; (2) from recommending less than honorable discharges to persons because of their race; (3) from threatening and intimidating Black enlisted personnel; (4) from giving more severe punishment to Blacks at Captain's Mast. (J.A. 16)

The respondents also sought to enjoin petitioners from violating the naval regulation on equal opportunity and treatment. (J.A. 16) Finally, the respondents sought damages for violation of their rights under 42 U.S.C. 1985(3) and the Fifth Amendment to the Constitution, (J.A. 17) and a declaration of their rights. (J.A. 2)

The District Court granted the petitioners' motion to dismiss based on three grounds: (1) failure to exhaust administrative remedies; (2) the actions are non-reviewable; (3) intra-service immunity. This occurred on January 30, 1979. (Pet. App. 22a).

On December 2, 1981, the Court of Appeals for the Ninth Circuit reversed. It stated that the respondents; stated two causes of action. One was under 42 U.S.C. 1985, while the other was under the equal protection clause of the Fifth Amendment for racial discrimination. (Pet. App. 2a)

The court assumed that the *Bivens* type complaint applied to service people and discussed two points—review of military decisions and immunity of military officers for violation of constitutional rights. (Pet. App. 4a)

As far as review of unconstitutional conduct of military officials, the Court of Appeals decided that there must be a balancing of the conflicting policy decisions—plaintiffs' in-

terest in obtaining redress for unconstitutional actions, on the other hand, the military's interest in maintaining discipline, smooth military operations, and keeping military decisions intact. (Pet. App. 6a)

The court then decided that the *Mindes*[1] principle of review was to be applied to determine if a violation of a recognized constitutional right was alleged and if there had been exhaustion of intraservice remedies. (Pet. App. 7a)

The Court of Appeals found that the respondents alleged a recognized constitutional violation of equal protection against racial discrimiantion. They also found that respondents alleged exhaustion of remedies to the Board for Corrections and Chief of Naval Personnel. (Pet. App. 19)

As a result, the court felt that the constitutional violations complained of should be reviewed by the following four factors to determine if review on the merits should be granted:

1. Strength of plaintiffs' complaint;
2. The potential injury to plaintiff;
3. The interference with military functions;
4. The extent of military expertise.

(App. Pet. 7a)

The court then ordered the case to be returned to the district court to apply the four *Mindes* factors.

The Court of Appeals also held that a military official only enjoys a qualified immunity for violation of the constitutional rights of another service member. It also noted that there may be exceptions to this rule for military officials exercising judicial or prosecutional functions or otherwise during time of war. (Pet. App. 16a)

This Court granted the Writ of Certiorari to the Court of Appeals on November 1, 1982.

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[1] *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971)

SUMMARY OF ARGUMENT

I

Enlisted personnel in the armed services, including Black enlisted personnel, enjoy the protection of the Bill of Rights. One by one, most of the guarantees of the constitutional amendments have been held applicable to the military. *Parisi* v. *Davidson*, 405 U.S. 34, 53 (1972) (Douglas concurring). The equal protection clause prohibiting racial discrimination is also applicable to service personnel in the armed services. *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975).

Enlisted personnel also enjoy the protection of federal statutes including those prohibiting racial discrimination in the armed services. *Taylor* v. *Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981). Finally, enlisted personnel are entitled to the protection of regulations prohibiting racial discrimination. *Hall* v. *Fry*, 509 F.2d 1105, 1109 (10th Cir. 1975); *Alvarez* v. *Wilson*, 431 F. Supp. 136 (N.D. Ill. 1977), *app. pending*, No. 81-2696 (7th Cir. 1981).

There is a long history of racial discrimination against Blacks in the armed forces of this country. In the main, Blacks have either been excluded entirely from the Army, Navy and Marine Corps, or have served in segregated units until the practice of Jim Crow was declared to be out of character with the aim of the military by President Harry S. Truman, Executive Order 9981, Federal Register, Vol. 13, p. 4313 (July 28, 1948).

However, de facto racial discrimination has existed in all branches of the armed services, including the Navy, from 1948 to the present. There is both intentional and systematic discrimination against Black service personnel in the military.[2]

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[2] See Dept. of Defense, *Report of the Task Force on The Administration of Military Justice in the Armed Forces*, November 30, 1972, *reprinted* in XIII, *Blacks in the United States Armed Forces: Basic Documents*, 455, 492 (M. MacGregor and B. Nalty editors 1977)

Enlisted personnel have a valid cause of action under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) to sue their superior officers for intentional racial discrimination in promotions, assignments, transfers, punishment and discharges. In the balance between individual constitutional rights to be free of racial discrimination versus military discipline, no action by the military can justify this severe deprivation of constitutional rights suffered by Blacks. This badge of infamy must be eliminated in the military, as it is being eliminated in the civilian community.

There are no special factors counseling hesitation which the petitioners can point to that would allow the practice of racial discrimination to continue. The special relationship between a superior and the enlisted ranks cannot justify racial conduct.

The military officers must recognize that the new concept of discipline cannot be used as an excuse for racism. The command-enlisted relationship, as well as discipline, break down totally where there is intentional or systematic racial discrimination by the superior officer toward the Black enlisted personnel.

Also, petitioners cannot point to an express remedy provided by Congress. They also fail to identify any internal military remedy that would grant the same remedy as would a *Bivens* action, or a suit for remedies under 42 U.S.C. 1985(3). All of the internal remedies mentioned by the petitioners, including 10 U.S.C. 938, 10 U.S.C. 1552 and the military penal code, cannot serve as a substitute for a federal court action. These so-called internal remedies have been recognized by the courts as being a farce for enlisted personnel. Also, the military has not been able to eliminate racial discrimination internally, it has only been able to perpetrate it.

Finally, failing to recognize the rights of Black enlisted personnel to federal court vindication of their rights will return the Blacks in the military to the days of *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393, 426 (1856) where Blacks were not

recognized as having the right to sue to vindicate their rights in the courts.

II

A federal district court has jurisdiction over the military to determine whether its officials are taking action in violation of a federal statute or in excess of statutory authority. *Harmon* v. *Brucker*, 355 U.S. 579 (1958). Otherwise, the military could make flagrant interpretations of federal statutes and deprive the enlisted personnel of their rights without benefit of judicial review. *United States* v. *Larinoff*, 431 U.S. 864 (1977).

There is a very long history in this Court of judicial relief for individuals who have been injured by an act of a government official acting in contravention to a federal statute. *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902). And the Ku Klux Klan Act, also known as the Civil Rights Act of 1871 [now 42 U.S.C. Section 1985(3)] prohibits all conspiracies, private and public, directed againts Black people seeking to deprive them of the equal protection of the laws. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). Federal officials are also answerable under 1985(3) for claims of racial discrimination. *Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926, 931 (10th Cir. 1975), *cert. denied*, 449 U.S. 1118, *reh. den.*, 450 U.S. 960. Therefore, military officials must also be answerable to federal review for violations of the laws and Constitution of the United States.

Second, for the same reasons, federal courts can review military administrative action which violates regulations protecting the rights of enlisted personnel. Members of the executive department must comply with self-imposed regulatory and procedural standards in dealing with its personnel. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Feliciano* v. *Laird*, 426 F.2d 424 (2nd Cir. 1970).

In addition, the review of allegations of constitutional violations should be based on the four *Mindes* factors which permit a federal court to determine whether a recognized constitutional

claim exists. This insures that only recognized constitutional violations are reviewed by the federal courts. *Mindes* v. *Seaman*, 453 F.2d 197.

III

The Court of Appeals was acting in accordance with past precedent of this Court when it held that executive officials only enjoy a qualified good faith immunity from suits alleging a violation of the constitutional amendments. No official is exempt from federal law and an absolute exemption from liability cannot be given except to justify public policy.

Constitutional rights must remain paramount within the military. A plethora of violations of the constitutional rights of Black enlisted personnel would result from an absolute immunity of federal military officials. The enlisted personnel who are made to bear the brunt of racial discrimination suffer an irreparable violation of their constitutional rights. There is no military rationale—the special relationship of a soldier and his superior, military discipline, combat and training, or unhesitating decisive action by a military officer—that would justify absolute immunity for racially discriminatory acts of officials of the military.

Further, granting of absolute immunity to military officers will only exacerbate the contradiction already existing between Black enlisted personnel and white officers. If these contradictions are not resolved through legal means, they find expression in uprisings and strikes that are much more destructive to military discipline than civil suits against federal officers.[3] This Court is at a crossroad--will it say that Blacks in the military are second class citizens and have no federal remedies against discrimination or will it affirm equality of Constitutional rights for all citizens?

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[3] Congressional Black Caucus, *Racism in the Military*, 36582-36596 (October 14, 1972) Cong. Rec. (hereinafter known as "Cong. Rec.").

ARGUMENT

POINT I

BLACK ENLISTED PERSONNEL IN THE UNITED STATES NAVY ARE ENTITLED TO THE SAFEGUARDS OF THE EQUAL PROTECTION CLAUSE, AS EMBODIED IN THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT; THE PROTECTIONS AFFORDED BY THE 1871 KU KLUX KLAN ACT [42 U.S.C. 1985(3)]; AND THE PROTECTION OF NAVAL REGULATIONS [OPNAV INSTRUCTION 5354.1a] TO BE FREE OF RACIAL DISCRIMINATION FROM THEIR SUPERIOR OFFICERS.

The respondents invoked the jurisdiction of the United States district court because their rights as Black enlisted personnel were being violated in three different ways by the petitioners. First, the petitioner officers and non-commissioned officers discriminatorily treated the five respondents in job assignments, training assignments, promotion, rotation, evaluations, captain's mast, discharges and threats of violence in violation of naval regulations prohibiting discriminatory treatment on the basis of race.[4] Second, these same petitioners conspired to deprive the five respondents of their statutory rights under the Fifth Amendment by keeping them out of skilled ratings on the ship, by denying them promotions or advancement to other positions, or the opportunities to attend schools where they would have been able to obtain better ratings and skills. Then, after subjecting respondents to these sufferings of racial oppression, petitioners conspired to discharge respondents with less than honorable discharges. This was done in violation of 42 U.S.C. 1985(3). Lastly, the actions of the petitioners were designed to deprive the respondents of their rights under the Fifth Amendment—not to be mistreated or discriminated against because of race, color or previous condition of servitude.[5]

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[4] OPNAV Instruction 5354.1a, March 8, 1978.

[5] The government argues here that there is no damage remedy for violation of the Fifth Amendment rights of servicemen. But respon-

Blacks in the military must be afforded a constitutional guarantee against racial oppression that is enforceable through civil court action.

A. Black Enlisted Personnel Have Suffered Racially Discriminatory Treatment And The Badge Of Slavery From The Revoultionary Period To The Present.

Blacks have served in the United States armed services since the Revolutionary War. Mueller, *The Negro In The Navy*, 24 Social Forces 110 (1945). Blacks were originally excluded from the Continental Army and Navy by orders of General George Washington. MacGregor and Nalty, *supra*, Vol. I, at 48, 63, 75. This policy was changed by the Continental Congress in 1776 allowing Blacks to enlist because the British were recruiting Blacks and because of manpower shortages. R. J. Stillman, II, *Integration of the Negro In The U.S. Armed Forces*, 8 (1968).

After the War of Independence and as a result of the Southern institution of slavery and the Northern policy of segregation, Congress passed the Militia Act of 1792, which excluded Blacks from militia service. In 1798, the Secretary of the Navy, Benjamin Stoddert, prohibited Blacks and mulattoes from enlisting in the Navy. MacGregor and Nalty, *supra* at 187, 192.

Once again during wartime, Congress permitted Blacks to enlist in the Navy from 1813-1816. But this was again prohibited by 1818. MacGregor and Nalty, *supra* at 213, 218. From 1818 until 1842 Blacks were kept at a five percent quota in the Navy. MacGregor and Nalty, *supra* at 219. And from 1842 to 1860 they were entirely excluded. Stillman, *supra* at 9.

Blacks have served with distinction in integrated crews during the Civil and Spanish American Wars, Mueller, *supra*, at 10; Bureau of Naval Personnel, *The Negro in the Navy*, 1,

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dents allege in their complaint violation of naval regulation, federal statute (42 U.S.C. 1985(3)) and the Fifth Amendment as a basis for relief. (J.A. 3, 7, 8, 10, 11, 12, 13, 14 and 15)

reprinted in MacGregor and Nalty, Vol. VI, 309. In 1922, the Navy suspended Black enlisted altogether, accepting only Filipinos as messmen. Black enlisted were accepted once again in 1933, but only as messmen.[6] By the beginning of World War II, Blacks constituted only 2.9% of the Navy, *Id.*, and there only 6 Blacks on active duty who were not messmen. *Id.* at 309-10.

The Navy changed its policy pursuant to presidential pressure on April 7, 1942 by accepting Blacks for "general service" in all ratings. *Id.* at 103. But, within two weeks, the Secretary of the Navy approved the suggestion made by Rear Admiral Jacobs, Chief of Naval Personnel, "that we train negro recruits . . . in a way to accomplish segregation." *Id.* at 108. Thus, despite the public position that Blacks would be accepted in all ratings, Admiral Jacobs decreed that:

> Apprentice seaman is the only rating in which negroes may be enlisted except those messman ratings previously authorized. Therefore, no requests for enlistment in other ratings shall be forwarded to the Bureau. *Id.* at 116.

The Secretary also limited Black recruitment to fixed quotas below the goal set by the President because of an inability to use Blacks "without resorting to mixed crews. . ." *Id.* at 128.

President Roosevelt himself noted the Navy's recalcitrance. In a memorandum to the Secretary of the Navy, he noted his policy of using Blacks in the armed forces in proportion to their numbers in the general populations. He stressed that the

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[6] *Id.* at 312. In this regard a December 24, 1941 report concluded that no consideration should be given to the further increased employment of enlisted of the Negro race, other than as Navy mess attendant. Among the so-called security rationales underlying this conclusion were the following:

> "the enlistment of Negroes (other than for mess attendants) leads to disruptive and undermining conditions."

Army had met this directive, "but the Navy is so far below. . . ."[7] He concluded:

> You know the headache we have had about this and the reluctance of the Navy to have any negroes. You and I have had to veto that Navy reluctance, and I think we have to do it again. *Id.* at 130-131.

After experimenting with all Black vessels, *Id.* at 243, the Navy ultimately opened sea assignments in integrated crews to Blacks. *Id.* at 244. This, however, was only for auxilitary vessles and only in crews not to exceed 10% of Blacks. *Id.* at 245, 248. In September, 1945, 85% of Blacks in the Navy were in the stewards' branch. Stillman, *supra* at 30. But even this degree of progress was short-lived. By 1946, the Navy had returned to its previous practice. At that time 4.4% of the Navy was Black, and 83% of the Blacks were serving as cooks, stewards or stewards mates. Less than 2% of the whites served in the same capacities. *Id.* at 36[8] In contrast, the Army was 8.2% Black, 9% of which were in the top three grades. Report of the President's Commission on Civil Rights, *To Secure These Rights*, 42, 45 (1948) ("Civil Rights Report").[9]

In the critical area of selecting and promoting Blacks to officer rank, the Navy's enduring racism is also apparent. Thus

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[7] At the time, the figure was 10%. The Army met this goal by 1949. The Navy took 38 years to do so; it did not reach the 10% goal until 1979. The Army stood at 33.2% Black in 1981, while the Navy was 12.0% Black. See Martin Binkin and Mark Eitelberg, *Blacks in the Military*, 42 (1982).

[8] In this regard, it is striking to note that three of the five respondents here, Cornelius Hickey, James Richardson, and George Shannon, all had ratings as messmen. And Wallace is in the unskilled rating of deck seamen.

[9] Recruitment and enlistment patterns between 1949 and 1964 further evidence the Navy's pitiful performance in promoting an integrated service. Thus, while during these years the percentage of Blacks in the Air Force increased from 5.1 to 10.0%; and from 2.1 to 8.7% in the Marine Corps, it only increased from 4.7 to 5.8% in the

in 1943 while under-secretary Adlai E. Stevenson argued for the inevitablity of Black officers, MacGregor and Nalty, *supra*, at 141,[10] the Bureau of Naval Personnel could only bring himself to grudgingly concur on the following basis:

> However unpalatable the idea may be, it is believed certain that . . . the Navy will be required to do so. . . . If the Navy prepares a limited program there is much greater numbers of [Black] officers on any certain percental [sic] basis. Memorandum for the Chief of Naval Personnel, MacGregor & Nalty, *supra*, at 142.

In any event, by 1947, there was still no Black officer with a regular commission. Granger, *Racial Democracy—The Navy Way*, 7 *Common Ground*, 61, 67 (1947). In 1948, there were but two Black naval offices amongst 21,793 Black enlisted men; while in contrast, there was one white officer for every seven white sailors. Similarly, the Coast Guard and the Marines had one and zero Black officers respectively at that time. This was an even worse record than the Army's, which had one Black officer for every 70 Black enlisted men, compared to a one to seven ratio for whites. Civil Rights Report at 1947 in MacGregor and Nalty, *supra*, Vol. VIII, 437.[11]

In 1962, President Kennedy established the Committee on Equal Opportunity in the Armed Forces also known as the Gesell Committee to investigate racial discrimination in the armed services. The Committee found that the Navy was still

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Navy. Stillman, *supra* at 64. Similarly, while the Army and the Air Force had 7,622 and 3,106 cadets each in ROTC units at 15 major Black colleges in 1964-65, there were no Navy ROTC programs at Black schools. *Id.* at 70. This pattern of the Navy lagging behind all other services, in Black enlistment still holds.

[10] He also observed that "one reason we have not had the best of the race is the suspicion of discrimination in the Navy." *Id.*

[11] The persistence of this pattern is further evidenced by the fact that by 1965 the percentage of Black officers in the Navy only reached 0.3%. Stillman, *supra*, at 67.

assigning substantial numbers (over 20%) of Blacks to the food service career field, while Black participation in the career technical fields was slight. The President's Committee on Equal Opportunity in the Armed Forces *Equality of Treatment and Opportunity for Negro Military Personnel Stationed Within the United States, reprinted* in MacGregor and Nalty, *supra*, Vol. XIII at 43. The Committee found that,

> "Many of the Negroes in the Navy and Marine Corps are still grouped in assignments which perpetrate the image of the Negro as a menial or servant *Id.* at 44.

Also, the Gesell Committee found that Black participation in the ranks of non-commissioned and commissioned officers indicated a lack of equality of treatment and opportunity. *Id.* at 46.

The advent of the all volunteer forces of the '70's has increased Black participation in the military, but sadly, it has not begun to eliminate the historical racism evidenced above. Indeed, the available data shows the persistence of discrimination in promotions, job assignments and discipline. Extensive study of Armed Forces data for 1972 shows that Black enlisted men are handicapped in job assignment and promotion policies.

In 1972, according to the Department of Defense, *Report of the Task Force on the Administration of Military Justice in the Armed Forces, reprinted* in MacGregor & Nalty, *supra*, Vol. XIII at 492-493: "Racial and ethnic discrimination exist in both its intentional and systematic manifestation in the military. Both forms have direct and unwholesome effects upon the military system and on the system of military justice . . . [Further], "intentional discrimination, though not condoned, is frequently practiced by some commanders and is not always within the reach of either the service secretaries or the Secretary of Defense."

And the Black Congressional Caucus in 1971 in its investigation of racism in the military found that Blacks are discriminated from the time they enter the service until the day they are discharged. Racism in the military they found takes

the forms of slow advancement, dead end job assignments, disproportionate punishment, subtle harassments, and bad discharges. Cong. Rec. at 36583.

Finally, Department of Defense statistics show in 1981 when Black sailors represented 11.7% of all Naval personnel they were vastly over represented in the low skilled seaman specialties (13.8%), and in service and supply specialties (14.3%). At the same time, they comprise only 5.3% of Electronic Equipment Repairmen and only 6.3% of Technical Specialists. Binkin and Eitelberg, *supra*, at 172.

Study of the available data for the Navy shows that racial discrimination continues to be manifest in the administration of discipline.

> Even when age, pay grade and education are taken into account, incarceration for Blacks in the Navy and Marine Corps are consistently higher than those for whites.

Perry, *An American Dilemma at Sea: Race and Incarceration in the Naval Justice System*, 41 Phylon 50, 56 (1980).

In sum, the history of the American military is one of entrenched and enduring racial discrimination. And the Navy has been, and continues to be, the greatest offender.

B. The Protection Of The Bill Of Rights Extends To Military Personnel.

This Court, as well as numerous other federal appellate courts, have held that military personnel are entitled to the protection of the Bill of Rights.

> *"For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts."*

Burns v. *Wilson*, 346 U.S. 137, 142-143 (1958).

Following *Burns*, this Court, various federal courts, and the Court of Military Appeals, have applied the Constitution to protect members of the military community. They have been guaranteed their rights to the First Amendment speech provision;[12] to the establishment of religion provision;[13] to the Fourth Amendment provision against unlawful searches;[14] to the Fifth Amendment provision for indictment by a grand jury;[15] to the protections against double jeopardy;[16] to the protection against self-incrimination;[17] to the protection against being deprived of life, liberty or property without due process;[18] to the protections of the Sixth Amendment;[19] and to the protections of the Eighth Amendment prohibiting cruel

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[12] "Members of the military are entitled to the protections of the First Amendment." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980); *Parker* v. *Levy*, 417 U.S. 733, 758 (1974); *Dash* v. *Commanding Officer*, 307 F. Supp. 849 (D.S.C. 1969); *aff'd per curiam*, 429 F.2d 427 (4th Cir. 1970) *cert. denied*, 401 U.S. 981 (1971); *Yahr* v. *Resor*, 431 F.2d 690 (4th Cir. 1970).

[13] *Anderson* v. *Laird*, 466 F.2d 283 (D.C. Cir. 1971)

[14] ". . .GIs are entitled to the protection of the Fourth Amendment." *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 474 (D.C. Cir. 1975); *Kaufman* v. *Secretary of the Air Force*, 415 F.2d 991, 996 (D.C. Cir. 1969), *cert. denied*, 376 U.S. 1073, *reh. denied*, 397 U.S. 1031 (1970).

[15] Applies to service personnel for crimes other than ones which are service connected. *O'Callahan* v. *Parker*, 395 U.S. 258, 272-273.

[16] *Wade* v. *Hunter*, 336 U.S. 684 (1949); *Sanford* v. *Robbins*, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941).

[17] *Kaufman* v. *Secretary of the Air Force*, 415 F.2d 991, *supra*.

[18] *Hagopian* v. *Knowlton*, 470 F.2d 201 (2nd Cir. 1972) (denial of right to hearing); *Grimm* v. *Brown*, 449 F.2d 654 (9th Cir. 1971) (denial of a fair and impartial hearing); *Vander Molen* v. *Stetson*. 471 F.2d 617 (D.C. Cir. 1971) (right to notice of hearing).

[19] Right to speedy trial. *United States* v. *Schlack*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964); right to a public trial, *United States* v. *Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1958); the right to confront

and unusual punishment.[20] Furthermore, the constitutional right of the equal protection clause applies to members of the military.[21]

This strong tradition recognizing constitutional rights of service personnel was reinforced by the Court of Military Appeals in 1967 when it stated:

> "The time is long since past when this court will lend an attentive ear to the argument that members of the armed forces are, by reason of their status, *ipso facto* deprived of all constitutional rights. *United States* v. *Tempia*, 16 U.S.C.M.A. 426, 37 C.M.R. 249, 253 (1967).

Service personnel are thus entitled to all of the rights and protections of the Bill of Rights. The federal courts have a special duty and obligation to recognize and enforce these rights.

C. Black Enlisted Personnel Have A Cause Of Action Against Their Superior Officers For Damages Under The Due Process Clause Of The Fifth Amendment For Violation Of Their Right To Be Free of Racial Discrimination.

In addition to the protections of the Bill of Rights afforded to all service personnel, Black enlisted personnel also are protected by the provisions of the equal protection clause prohibiting racial discrimination. In terms of legal rights, the equal protection clause of the United States Constitution has been recognized as the greatest source of judicial protection for

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witnesses, *United States* v. *Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); the right to compulsory service of process, *United States* v. *Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964); and the right to assistance of counsel, *Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965).

[20] *Powers* v. *Hunter*, 178 F.2d 141 (10th Cir. 1949), *cert. denied*, 339 U.S. 986 (1950).

[21] *Frontiero* v. *Richardson*, 411 U.S. 677; *Schlesinger* v. *Ballard*, 419 U.S. 498.

Blacks during the last thirty years since *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

The equal protection clause was intended to remove that form of racial discrimination that "is practically a brand upon them [Blacks], affixed by law, an assertion of their inferiority and a stimulant to race prejudice which is an impediment to securing to individuals of that race that equal justice which the law aims to secure to all others," *Strauden* v. *West Virginia*, 100 U.S. 303, 308 (1880), and that "puts the brand of servitude and degradation" upon Blacks. *Plessy* v. *Ferguson*, 163 U.S. 537, 562 (Justice Harlan dissenting).

Eventually, the Supreme Court adopted the principle that any law predicated on the view that one person is by virtue of race inferior to another offends equal protection. *Brown* v. *Board of Education*, 347 U.S. 483. And racial discrimination has been legally outlawed in public school facilities, as well as courts,[22] parks,[23] beaches,[24] buses,[25] golf courses,[26] and prisons,[27] because of the serious moral and constitutional deprivations involved.

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[22] *Johnson* v. *Virginia*, 373 U.S. 61, 62 (1963)

[23] *New Orleans City Park Improvement Association* v. *Detiege*, 358 U.S. 54 (1958)

[24] *City Council of Baltimore* v. *Dawson*, 350 U.S. 877 (1955).

[25] *Gayle* v. *Browder*, 352 U.S. 903 (1956)

[26] *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955)

[27] *Lee* v. *Washington*, 390 U.S. 333 (1968). One of the main arguments of the petitioners is that "Personal damage actions [for racial discrimintion] would disrupt military discipline for a number of reasons." (Pet. Brief, p. 22) The similarity between petitioners' argument and the position of Alabama in *Lee* v. *Washington*, *supra*, is quite profound. It is true that both prisoners and service personnel are subject to greater regimentation and discipline than are other members of society. But discipline cannot justify racial discimination and must be eliminated in the military, as it has in prisons.

Equal protection rights to be free from racial discrimination must be enforced through the federal courts. Where a plaintiff is a member of "the class of those litigants who *allege* that their own constitutional rights have been violated, and who at the same time have no other effective means other than the judiciary to enforce these rights, [they] must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis* v. *Passman*, 442 U.S. 228, 242 (1979) (Emphasis added).

Chief Justice John Marshall in his opinion in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 162-163 (1803) places the issues of constitutional rights and concomitant remedies in clear perspective.

> "If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[28]

The United States Supreme Court has held that a valid cause of action may be directly implied under the equal protection provision as it is embodied in the Due Process Clause of the Fifth Amendment. *Jacobs* v. *United States*, 290 U.S. 13 (1933); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Davis* v. *Passman*, 442 U.S. 228.

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[28] The petitioners argue that "this Court should not permit implied consitutional damages actions by servicemen against their superiors." (Pet. Brief, p. 15) In essence, the petitioners are arguing against the holding of *Marbury* insofar as they recognize respondents' constitutional right to be free of racial discrimination, but state that respondents should have no remedy in the federal courts.

Also, numerous courts of appeal have implied causes of action under the Due Process Clause of the Fifth Amendment. *Bennett* v. *Campbell*, 564 F.2d 329 (9th Cir. 1977); *Apton* v. *Wilson*, 506 F.2d 83 (D.C. Cir. 1974); *United States ex rel. Moore* v. *Koelzer*, 457 F.2d 892, 894 (3rd Cir. 1972); *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977); *modified, Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Cox* v. *Stanton*, 529 F.2d 47 (4th Cir. 1975) (Fourteenth Amendment's Due Process Clause).

Numerous federal courts have held that members of the military have a valid cause of action against military officials for violation of their constitutional rights. *Taylor* v. *Jones*, 653 F.2d 1193 (8th Cir. 1981) (racial discrimination); *Tigue* v. *Swain*, 585 F.2d 909 (1978);[29] *Berk* v. *Laird*, 429 F.2d 302, 306 (2nd Cir. 1970), *cert. denied*, 404 U.S. 869 (1971) (transfer to Vietnam); *Klinkhammer* v. *Richardson*, 359 F. Supp. 67, 70 (D.Minn. 1973), *aff'd*, 488 F.2d 920 (8th Cir. 1973) (threat of involuntary inactivation of reservist for hair regulations); *Williams* v. *Rogers*, 449 F.2d 513, 518 (8th Cir. 1971) *cert. denied*, 405 U.S. 926 (1972) (transfer to Philippines); *Crawford* v. *Cushman*, 531 F.2d 1114 (2nd Cir. 1976) (discharge of pregnant woman Marine in violation of due process); *Crozman* v. *Callahan*, 136 F. Supp. 466, 468 (W.D. Okla. 1955); *Nixon* v. *Reeves*, 65 Minn. 159, 67 N.W. 989 (1896) (false imprisonment); *Clark* v. *Cummins*, 47 Ill. 372 (conversion); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144, 162 (D.D.C. 1976) (denial of sixth amendment right to counsel); *Tyler* v. *Pomeroy*, 8 Allen (Mass.) 480 (unlawful court martial); *Zitsen* v. *Walsh*, 352 F. Supp. 438 (D. Conn. 1972)[30] (denied due process

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[29] The court there stated "The complaint alleges sufficient facts to establish that [Captain] Tigue was unlawfully deprived of liberty without due process of law when he was confined at Kirsler Air Force Base for twenty two days." 585 F.2d at 913.

[30] In its decision, the court held "since the plaintiff has sufficiently alleged a non-frivolous federal claim that the defendants have de-

hearing); *Alvarez* v. *Wilson*, 431 F. Supp. 136, *supra*, (racial discrimination by naval officers).

The court in *Alvarez* stated any "intentional discriminatory conduct by federal [Naval] officials, regardless of the fairness of the laws under which they act, constitutes a violation of the concept of equal protection of the laws . . . There can be no question that [Lieutenant] Alvarez's complaint alleges deprivation of federally protected rights." 431 F. Supp. at 141.

This Court in *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 (1851) recognized that the plaintiff, who was a Marine in the United States Navy, had a cause of action against his commanding officer. The Marine sued on the common law tort of unlawful imprisonment and on the Eighth Amendment provision against cruel and unusual punishment. The Court noted that "the case is one of much delicacy and importance as regards our naval service." The Court in *Dinsman* held that a marine is entitled to recover damages "if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling toward him on the part of Captain Wilkes, or by a disposition to oppress him. . . ." 53 U.S. at 430.[31]

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prived him of his constitutional rights guaranteed to him under the First and Fourteenth Amendments to the Constitution, his complaint cannot be dismissed for lack of jurisdiction." 352 F. Supp. at 440.

[31] The petitioners make the point that essentially every court of appeal that has decided the issue has held that a serviceman cannot sue his superior officer for damages for a constitutional violation. (Pet. Brief, pp. 14-15). They cite 14 cases for that proposition. But most of those cases involved the application of *Feres* to suits between military members involving medical malpractice or negligent actions. *Rotko* v. *Abrams*, 338 F. Supp. 46, 48 (D.Conn. 1971), *aff'd.* 455 F.2d 992 (2nd Cir. 1972) (medical malpractice); *Laswell* v. *Brown*, 638 F.2d 261, 268-9 (8th Cir. 1982) *cert. pending* No. 82-5574 (October 19, 1982) (malpractice action); *Bailey* v. *DeQuevedo*, 375 F.2d 298, (3rd Cir. 1967) *cert. denied*, 389 U.S. 923 (1967) (action by

Historical precedent from common law establishes that enlisted personnel may sue their commanding officer for wanton or oppressive violations of their rights. Actions by officers or soldiers have been allowed for unauthorized arrest and imprisonment by their superior officers in England. *Hannaford* v. *Hunn*, 172 Eng. Rpts. 68 (1825); *Warden* v. *Bailey*, 128 Eng. Rpts. 253 (1811). The essential element is that the defendant officers acted upon malicious intent or in bad faith by exceeding the proper scope of military authority. *Wall* v. *MacNamara*, 1 Term 536 (1779); *Swinton* v. *Molloy*, 1 T.R. 536-7; *Mostyn* v. *Fabriges*, Cowp. 161.

"Actions of trespass for injuries to the person have been frequently brought and sustained in the common law courts of England, against naval as well as military commanders, by their subordinates, for acts done at home and abroad, under pretense and color of naval and military discipline." *Wilson* v. *Mackenzie*, 7 Hill (N.Y.) 95 (1845).

Also, a valid cause of action is stated for the act of instituting false and malicious charges by a superior military officer against his subordinates. *Cobbett's case*—Opinion of Law Officers, London (1809) in Winthrop, *Military Law and Precedents*, (2nd Ed. 1896); *Harwood* v. *Green*, 3 C.P. 141.

Actions for damages by military personnel have been allowed against superior officers who have inflicted illegal or

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enlisted man against Army surgeon for malpractice); *Misko* v. *United States*, 453 F. Supp. 513 (D.D.C. 1978) *aff'd.* 593 F.2d 1371 (1978) (hospitalized and drugged against his will); *Roach* v. *Shields*, 371 F. Supp. 1392 (E.D. Pa. 1974) *aff'd.* 504 F.2d 1093 (3rd Cir. 1974) (action by active duty member against Navy Doctor for malpractice); *Bailey* v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965) (no cause of action for malpractice by Army surgeon when sued by enlisted man); while the others involve only negligence. *Hass* v. *United States*, 518 F.2d 1138, (14th Cir. 1975); *Sigler* v. *LeVan*, 485 F. Supp. 185 (D. Md. 1980); *Calhoun* v. *United States*, 604 F.2d 647 (9th Cir. 1979); *Thornwell* v. *United States*, 471 F. Supp. 344 (D.D.C. 1979).

excessive punishment (flogging) on their inferiors. *Grant* v. *Shard*, 4 Taunt, 84; *Warden* v. *Bailey, supra; Joseph Wall*, 28 Howell, S.T. 51; *Frye* v. *Sir Chaloner Ogle*, 1 McArthur on Courts Martial, 268 (4th Ed.). The Chief Justice, Sir John Willes, stated as to the action of military officers trying to impose illegal punishment: "whoever get themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken." See 1 McArthur, 436 cited with approval in *Wilson* v. *Mackenzie*, 7 Hill, 95.

Winthrop in his treatise on *Military Law and Precedents* cites no less than thirty cases for the proposition of suits by military personnel against the superior officers for illegal arrests, imprisonment, illegal punishment, unjustified violence and making false charges. See pages 1378-1382. In addition, see *Mallory* v. *Merrit*, 17 Conn. 177 and *Frier* v. *Marshall*, 4 Fost. & Fin. 485.

1. Once a cause of action is established under *Bivens*, plaintiffs should have a right to damages.

Finally, there is the question of a judicial remedy for violation of the Constitutional right to equal protection. This Court in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971) held "that damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials. . . ." Damages are the usual remedy for any violation of an individual's right to life or liberty. *Davis* v. *Passman*, 442 U.S. 228, 246. And in *Carlson* v. *Green*, 446 U.S. 14, 18 (1980), this Court stated "that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." See Katz, *The Jurisprudence of Remedies, Constitutional Legality and the Law of Torts*, 117 U. Pa. L. Rev. 1, 40 (1968).

In the case of Black enlisted personnel, the right to collect damages for violation of their rights to be free of racial discrimination and the badge of inferiority is even greater. The tremendous oppression and degradation faced by the respon-

dents and other Black enlisted personnel can only be partly repaid by a money judgment. It is folly to believe that a human being's self-respect or loss of dignity can be rectified through monetary compensation alone. But more important is the deterrent effect that such awards will have on naval officers who use their position to oppress and violate rights of Black enlisted personnel. This is what the remedy in *Bivens*, *Davis*, and *Carlson* is intended to do. *The limits of Implied Constitutional Damage Actions: New Boundaries for Bivens*. 55 N.Y.U.L. Rev. 1238, 1253 (1980).

In one of the most important decisions involving racial discrimination by a superior officer against a Black enlisted personnel in the military, the Court of Appeals for the Eighth Circuit affirmed the lower court's decision and held:

> "If plaintiff has proved that she lost her recruiter position as a result of deliberate racial discrimination, does she have a judicial remedy? In a society where few policies are as deeply rooted in constitutional jurisprudence as the prohibition against racial discrimination the answer must be yes." *Taylor* v. *Jones*, 653 F.2d 1193, 1200.

The racial discrimination in this case mandates that the respondents be allowed to make their superiors accountable for their actions in contravention of the Constitution. Whether it is damages, injunctive relief or declaratory judgment, this court must allow remedies to the respondents for the violation of their constitutional rights. The conduct of the petitioners in using racial factors in denying respondents skilled ratings, promotions, transfers, rotation, training, honorable discharges, by unfair punishment, in making verbal threats of violence, and by refusing to end the actions of known Ku Klux Klan sympathizers on the U.S.S. Decator all attest to the need to recognize the damage remedy of *Bivens* for Black enlisted personnel.[32]

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[32] Some of the previous English authorities have awarded damages to plaintiff soldiers or sailors against their commanders for violation of their personal liberties. *Hannaford* v. *Hunn*, 172 Eng.Rpts. 68

A cause of action under *Bivens* can be defeated in only two situations. The first is when defendants can show "special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 346. The second is when defendants can prove "that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed equally as effective." *Carlson* v. *Green*, 446 U.S. 14, 18.

D. In This Case The Petitioners Can Show No Special Factors Counseling Hesitation Or Express Remedies Provided By Congress

Members of Congress (outside official proceedings), federal prison officials, and federal police officials derive their authority and status from a constitutional scheme that affords constitutional remedies to persons whose rights are violated under color of that authority. Legislators, police, and prison officials must obey the law, as must the common folk. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388; *Davis* v. *Passman*, 442 U.S. 228; *Carlson* v. *Green*, 446 U.S. 14. "Moreover, even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz* v. *Economou*, 438 U.S. 478 (1978) provides adequate protection." *Carlson* v. *Green*, 446 U.S. at 19.

1. The petitioners do not show that there are special factors counseling hesitation.

The military officers here are not of such independent status as the Congressman in *Davis*. They are more on the level of the police officials in *Bivens* or the prison officials in *Carlson* whose duty is to protect national interests. Petitioners have the same

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(plaintiff recovered £300 damages); *Wall* v. *McNamara*, 1 Term. 536 (plaintiff awarded £1000 damages); *Frye* v. *Sir Chaloner Ogle*, *supra*, (plaintiff awarded £1000 against head of court).

type of constitutional status as the defendants in *Butz* v. *Economou, supra*, and therefore, they are not entitled to be protected for their racial discriminatory actions against Black enlisted men.

First, the petitioners correctly stated that a general jurisdictional statute, particularly 28 U.S.C. 1331, is a "sufficient basis for an implied damages remedy because damages as a 'remedial mechanism [are] available in the federal courts'." (Pet. Brief at 12). But they then go on to state that the remedy for constitutional violations of enlisted personnel by their superior officers should not be granted to enlisted personnel because of the special relationship of a soldier to his superiors which are special factors counseling hesitation.

But the courts cannot grant exceptions to a general jurisdictional statute passed by Congress. Congress gave all persons the right to file suits in federal district courts under 28 U.S.C. 1331 for actions arising under the Constitution, laws or treaties of the United States. It is for Congress to carve out exceptions, not the federal courts. It would be a violation of the separation of powers doctrine for the court to attempt to increase or decrease its own jurisdiction under 28 U.S.C. 1331. Article I, Section 1 of the United States Constitution vests all legislative power in the Congress of the United States. Article III, Section 2 provides that the "judicial power shall extend to *all cases*, in Law and Equity arising under the Constitution, the Laws of the United States, and Treaties made, or which should be made under their authority." In *Ex Parte McCardle*, 74 U.S. (7 Wall) 506 (1869) this Court held that Congressional power under the Constitution in excepting federal jurisdiction from the federal courts can only be examined by the Supreme Court to test its constitutionality. The Court cannot alter, by adding to or taking away from, the jurisdictional exceptions of Congress.

The petitioners here are asking this Court to violate Article I by legislating an exception to the general jurisdictional statute to exclude service personnel. This the Court does not have jurisdiction to do.

But second, they are asking the Court to violate Article III by refusing to hear valid disputes arising under the law and Constitution, particularly disputes of racial discrimination brought under 28 U.S.C. § 1331, and the Equal Protection Clause. This the Court should refuse to do.

The petitioners further argue that allowing enlisted personnel to sue his (her) superiors will interfere with the special relationship of a sailor to his (her) superior for other reasons.

It will interfere with military discipline and the command relationship. It will cause commanders to hesitate before issuing orders because of their fear of personnel liability. They go on to say the comprehensive regimentation gives rise to constant complaints of unfairness, and possible suits. Finally, they argue that the military "habit of automatic obedience" will be interfered with. (Pet. Brief, 27)

The concept of military discipline as argued by the petitioners is a concept officially discarded in the military system. Authoritative discipline as an automatic, unquestioning and final obedience is the product of rigid adherence to rules, regularity, subordination and devotion. It is a product of the feudal mentality that was copied by the Prussian, English, early American and Southern United States military apparatus. It is based upon the caste system where the landed aristocracy is the officer corps and the peasantry is the rank and file. Morris Janowitz, *The Professional Soldier* (1960) 35-37.

In the United States Army and Navy there had been a trend away from this authoritative approach and a leaning toward the managerial approach of leadership in the military since 1905. This is necessitated by the fact that the social composition of enlisted personnel being more of citizen-soldiers who are used to democratic procedures. The positive techniques used to insure discipline are emphasized: interest in the well-being of the solider, competence of leadership, and the inculcation of confidence and self-reliance. Captain M. B. Stewart,

The Army as a Factor in the Upbuilding of Society, Journal of the Military Service Institute (1905) 391-404.

The modern military is faced with the managerial dilemma between military discipline and democratic political process. And military discipline can only be justified because of its importance to the violence of war. The basic concept in officer-enlisted relationship is initiative, psychology and morale. Janowitz, *supra* at 39-45.

As a result of the abuses that enlisted men suffered at the hands of their officers during World War II, a special board (Doolittle Board) was established by the War Department in 1946 to make findings and recommendations. One of its more important recommendations was that "There is need for a new philosophy in the military order, a policy of treatment of men, especially in the ranks in terms of advanced concepts of social thinking. The present system does not permit full recognition of the dignities of men. More definite protection from the arbitrary acts of superiors is needed." Report of The Secretary of War's Board on Officer-Enlisted Relationships (Doolittle Report) (1946) para. III.

All of the military academys have shifted their approach from the so-called "heroic" orientation of discipline which stressed authoritarian, blind discipline to the managerial orientation. "The combat-model leadership in which a quality example is offered and unhestitating unquestioned obedience is demanded, will become more and more rare. Effective leadership will be increasingly predicated upon respect for job knowledge and competence accompanied by the ability to offer sound, rational reasons for the course of action required. The enlistment of voluntary eager cooperation will be the mark of the leader of the future, rather than the use of fear as a goal to performance. Air Force Academy, Draft of 15 Year Plan, January 7, 1970 in L.I. Radway, *Recent Trends at American Service Academies*, in Charles C. Moskos, Jr., *Public Opinion and The Military Establishment* (1971) 27-28.

The necessity of providing good leadership is necessary to insure that the morale and discipline of the troops are high. Nothing lowers discipline more than does a low morale. Poor leadership is the most common cause of low morale and a dissippated discipline. Lt. A.W. Lane, *The Attainment of Military Discipline*, *Journal of Military Service Institute*, (1944) 1-19. Janowitz, *supra* at 39; Doolittle Report, *supra*, at Section II, F, 3.

The effect of racism on the Black enlisted destroys discipline and the special relationship of enlisted personnel to their commanding officer. It lowers their morale and it also prohibits effective obedience of the Black enlisted to the orders of their superior officer.

So the special relationship which is necessary for the military to exist is destroyed or weakened by the individual, as well as the institutionalized racism practiced by some individual commanding officers. "There can be no real and lasting discipline for American servicemen that does not rest upon a fair and just administration of our laws . . . There is no room for discrimination, unfair treatment, by or upon any groups or individuals." *Task Force Report*, *reprinted* in MacGregor & Nalty, *supra*, Vol. XIII, 484-485.

Once the superior officer destroys the special relationship, the bringing of a lawsuit to enjoin discriminatory practices, to require the commander to follow his naval regulations prohibiting unequal treatment, or for damages for his discriminatory action will not destroy a relationship that has already been subverted by racism. It will in effect require the commander to respect the constitutional rights of the Black enlisted men. If he changes, the commander will be a more trusted, respected and professional leader.

In addition, the petitioners are arguing for a return to the Prussian type of absolute discipline. It may be the method of commanding troops of a few "heroic" commanders, but it is not the present policy of the Pentagon or the officer corps in today's military. So, the petitioners' position that this type of

discipline will be interfered with is unfounded. There will be no interference because this type of discipline does not exist. The managerial method of instilling discipline recognizes the reciprocal rights and duties of enlisted. It will not be hampered by lawsuits because it is based on a rational approach toward human beings and not a totalitarian approach.

But most important, the concept of military discipline is merely a shorthand description for what is an equilibrium of forces. The notion that discipline can exist in the context of blind obedience to commands issued by an officer corps unburdened by an effective obligation to respect the fundamental constitutional rights of enlisted personnel is refuted by the history of revolts in the ranks where official denial of such rights has occurred.

The effects of racial discrimination and feelings of inferiority caused by the acts of superior officers toward Blacks has already been the cause of serious breakdowns in discipline of the Black enlisted personnel. Acts of prejudice and racial hatred caused by white officers deeply affect any personal relationship developed between a sailor and his commander. The massive racial discrimination by commanders in the Navy and armed services has caused massive discontent that occurs in the face of denial of constitional rights of service personnel.[33]

One of the most notorious ruptures occurred as a result of the violence perpetrated against Black prisoners at the stockade at Fort Bragg, North Carolina on June 23, 1968 when 238 inmates sezied the stockade and held it for three days. The immediate cause of the uprising was that Private Johnson, a Black, was physically hosed down with a fire hose by order of the commandant of the prison, a white major, then set upon by the noncommissioned officer guards who violently beat him. Private Johnson had been in solitary confinement for 78 days prior to the riot because "he had dared to fight back when the comman-

[33] Cong. Rec. at 36853

dant of the prison, a major, had spit in his face and taunted him."[34]

On October 14, 1968, twenty-seven young soldiers at the army stockade, Presidio Army Base, San Francisco, California, sat down to protest (1) the brutal slaying of one of the prisoners by a guard, (2) the terrible oppressive conditions at the stockade including physical beatings, threats of violence and physical intimidation by the guards, and (3) the lack of response to their complaints that were made to the Army officer in the stockade.[35]

Another massive rupture following gross denial of rights occurred on June 5, 1969 when more than 150 soldiers in the Fort Dix stockade, New Jersey, rebelled. The Congressional investigation found that it was caused by beatings by guards, failure to give medical care to the injured and sick, inhumane food, and the most degrading living conditions.[36]

In the spring of 1969, three hundred prisoners at the Fort Ord, California stockade held a sit-down protest against the physical brutality of the guards, the bad living conditions and the short rations.[37]

In 1968, several hundred Black soldiers took over a section of the facility at the Long Binh Jail in Vietnam to protest the racial conditions and physical brutality by the guards, and complicity by the officers.[38]

Also, there were two large racial incidents of Blacks in the Marine Corps as a result of racial discrimination practiced by

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[34] Robert Sherrill, *Military Justice is to Justice as Military Music is to Music* (1970), 200.

[35] Fred Gardner, *Unlawful Concert* (1970).

[36] Sherrill, *supra*, at 201-2.

[37] *Id.* at 205.

[38] *Id.* at 205, New York *Times*, September 4, 1968.

officers and others. One occurred at Camp Lejuene, North Carolina, in July of 1969 and the other in August of 1969 at Koneshe Naval Air Station, Honolulu.[39]

In May, 1981, four days of rioting occurred at Travis Air Force Base, California as a result of racial incidents on the base involving violation of the rights of Black enlisted personnel, and inaction by the officers.[40]

One of the most serious incidents recently involving Black enlisted personnel happened on board the aircraft carrier U.S.S. Kitty Hawk at Subic Bay, Philippines on October 12, 1972. On that day, a riot on the ship by Black enlisted personnel was caused by the orders of the white commanding officer which prohibited Blacks from walking in groups of more than two persons aboard the vessel, and ordering his Marines to enforce the order.[41]

This incident lasted nearly all day and resulted in the injury of 47 men and the court-martial of 21 others.

An even larger racial incident occurred on the aircraft carrier U.S.S. Constellation on November 5, 1972. One hundred twenty-five Black naval enlisted personnel had seized the main mess decks of the vessel to protest the racial command policies and the commanding officer's refusal to meet with them. Their main grievances were the command policy of attempting to discharge six Blacks with less than honorable discharges because they were "agitators"; the non-judicial punishment being given discriminatorily against Blacks, and the dirtiest and most menial jobs on the ship were often given to Blacks.

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[39] Adam Yarmolinsky, *The Military Establishment: Impacts on American Society* (1971), 344.

[40] Gropman, *The Air Force Integrates*, pp. 215-216.

[41] See Report by the Special Subcommittee on Disciplinary Problems in the Navy, of the Committee on Armed Services, House of Representatives, Ninety-Second Congress, Second Session, January 2, 1973, reprinted in MacGregor and Nalty, *supra*, Vol. XIII, 613-616; *Voice & Viewpoint*, November 15, 1972.

The ship had to cease its exercises and return to San Diego. The command partially met the demands of the Blacks.[42]

On November 13, 1976 a protest was staged by Black Marines at Camp Pendleton, Oceanside, California. The Ku Klux Klan had been openly operating on the Marine Corps Base for nearly one year and were burning crosses, beating and threatening Blacks, and distributing anti-Black literature. Various officers of the First Force Surface Battalion knew of the operation of the Klan and knew of the complaints of Black Marines requesting that they stop the Klan. But the officers refused to take any action. The protest resulted, causing the court martial of fourteen Black Marines. The command finally removed the members of the Ku Klux Klan from the base.[43] *United States* v. *Matthews*, 7 MLR 2336 (NCMR 1979).

The cause of military discipline is aided and not hindered by an effective means of enforcing constitutional rights among enlisted personnel concomitant to that in the hands of the officer corps to enforce violations of its orders. Military power is not absolute and the law must protect the personal rights and liberties of the enlisted by limiting the absolute power of the commander. Lane, *supra*, 1-19.

Lastly, the position of the petitioners that the special relationship of the enlisted person to his (her) superior is a special factor counseling hesitation and preventing a damage action would place Blacks in the military in a unique position. They would be similarly situated to that held by Black masses after the infamous decision of *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393, 426 (1856). Like Dred Scott, the Black enlisted person would not be entitled to sue in the courts even though

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[42] See MacGregor and Nalty, *supra*, Vol. XIII, 616-618; San Diego Committee, *Turning the Regs Around* (1974), 31-32; Robert W. Mullen, *Blacks in America's Wars: The Shift in Attitudes From the Revolutionary War to Vietnam* (1973); Los Angeles *Times*, November 8, 1972.

[43] Los Angeles *Times*, November 15, 1976.

his (her) rights were violated. This would set Black people back over one hundred years to the time before the Thirteenth and Fourteenth Amendments. It would impose a badge of slavery upon them of the rights under these Amendments and the federal statutes.

Surely the petitioners cannot be asking the court to place this type of badge of infamy upon Blacks.

The petitioners can point to no authority for the proposition that bringing an action to enforce one's constitutional rights will cause a serious breakdown of the command-enlisted relationship and will make commanders hesitate before issuing orders. The numerous lawsuits instituted during the Vietnam War era and afterwards for matters from issues of hair-cut regulation to issues of court-martial jurisdiction have not interfered with the command-enlisted relationship. To believe that this remedy would suddenly cause a breakdown of the command-enlisted relationship is unfounded and strains one's credibility.

2. The petitioners have not shown that Congress has provided an alternative remedy which it explicitly declared should be a substitute for recovery under the Constitution and viewed as equally effective.

Federal courts may not deny a remedy under *Bivens* unless the petitioners show an explicit Congressional declaration that persons injured by federal officials may not recover money damages from those officials. "Also, there must be another remedy, equally effective in the view of Congress." *Carlson* v. *Green*, 446 U.S. at 20.

In addition, a *Bivens* action is deemed more effective than most statutory remedies. (1) It serves as a deterrent effect on individual violations of the Constitution by allowing recovery against the individual. (2) It allows punitive damages which are especially appropriate to redress violations by federal officials. (3) It allows jury trials. (4) It allows the action to be governed by uniform rules of conduct. *Carlson* v. *Green*, 446 U.S. at 21-22.

The petitioners are never able to show that Congress expressly provided that Black enlisted personnel injured by violations of their right to equal protection have another remedy at law.

First, the petitioners rely on *Feres* v. *United States*, 340 U.S. 135 (1950) and its progeny for the principle that since the Courts have held that the Federal Tort Claims Act does not permit the servicemen to sue the United States for service-related injuries, it should not be allowed for constitutional violations. (Pet. Brief, pp. 16-17) But the *Feres* doctrine only applies to suits for negligence by one service personnel against another. It does not apply to intentional torts. This Court cited *Dinsman* v. *Wilkes*, 12 How. 390 in Footnote 10 of *Feres* for that proposition. *Feres* v. *United States*, 340 U.S. at 141. Nor does *Feres* apply to constitutional violations.

This Court in *Feres* listed three factors for its ruling. First, the relationship between the government and members of the armed forces is distinctively federal in character. But the peculiar federal character of the armed forces or of federal employment is no longer a viable reason for immunizing federal officials. *Davis* v. *Passman*, 442 U.S. 228; *Carlson* v. *Green*, 446 U.S. 14.

Next, the Court stated that Congress passed a series of enactments giving compensation for injuries or death to members of the armed forces on a no-fault basis. But no such scheme exists for intentional injuries or constitutional violations. Veterans benefits, like worker's compensation, do not provide relief for intentional injuries against employees. See AA Larson, *Law of Worker's Compensation*, Section 68 (1976).

The last rationale for *Feres* was that it would be unfair to subject members of the military to different standards of care based on the law of the state where they are stationed. But this requirement of uniformity is not applicable to claims based on the constitution or federal civil rights act.

Also, the *Feres* doctrine is limited by the more recent court cases which held that government officials are not entitled to

an absolute immunity for violation of the constitutional rights of citizens of this country. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Wood* v. *Struckland*, 420 U.S. 308 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Butz* v. *Economou*, 438 U.S. 478; *Harlow* v. *Fitzgerald*, ___ U.S. ___ 73 L.Ed.2d 404 (1982); *Davis* v. *Passman*, 442 U.S. 228; *Carlson* v. *Green*, 446 U.S. 14.

Next, the petitioners state that the relief available for a court-martial conviction pursuant to habeas corpus jurisdiction is narrower over military criminal procedure then over state criminal procedure because of the demands of discipline and that this justifies not recognizing a damage remedy.

However, the rule in many circuits is that the standard of review in court-martial is the same as that for habeas corpus review of state convictions. *Burns* is interpreted not as having a different standard of review but as deferring to military finding of facts, as is done in petitions for habeas corpus from state proceedings. *Kaufmann* v. *Secretary of the Air Force*, 415 F.2d 991, *supra; Harris* v. *Ciccone*, 417 F.2d 479 (8th Cir. 1969) *cert. denied* 397 U.S. 1078 (1970); *Heilman* v. *United States*, 406 F.2d 1011 (7th Cir. 1968), *cert. denied*, 396 U.S. 860 (1969).

The petitioners then make the bold assertion that habeas corpus review of military administrative decisions is strictly limited and cites *Orloff* v. *Willoughby*, 345 U.S. 83 (1953). Although this Court refused to review the specific duty assignment in *Orloff*, it did review the action of the military to determine if it was acting within the scope of its lawful powers, stating that, "the [draft] statute should be interpreted to obligate the army to clarify specifically inducted professional people with the categories which rendered them liable to induction." 345 U.S. at 86.

Further, the federal courts have reviewed military decisions using the "basis in fact" test which is much narrower than the "acting within lawful powers" test. *Negre* v. *Larsen, consolidated subnom; Gillette* v. *United States*, 401 U.S. 437

(1971); *Hammond* v. *Lenfest*, 398 F.2d 705, 715 (2nd Cir. 1968); *Packard* v. *Rollins*, 422 F.2d 525 (8th Cir. 1970); *Ward* v. *Volpe*, 484 F.2d 1230 (9th Cir. 1973).

But even further this Court has held that the writ of habeas corpus is available to military personnel who claimed to be unlawfully retained in the armed services. *Parisi* v. *Davidson*, 405 U.S. 34. This is similar to relief to any civilians who are unlawfully being held in custody.

In addition, the petitioners allege that injunctive relief is more limited in the military than in the civilian community and cite *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). But the rule of *Councilman* was adopted from the rule of *Younger* v. *Harris*, 401 U.S. 37 (1971) which essentially prohibited federal court intervention in state criminal proceedings under the maxim that equity will not enjoin a criminal prosecution.

But *Councilman* does not deny a remedy to service personnel, it is merely a question of federal abstention applied to the military.

Injunctive relief and mandamus are available against the military when it violates its own regulations. *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965); *Mela* v. *Calloway*, 2 M.L.R. 2217 (S.D. N.Y. 1974); *Crawley* v. *United States*, 338 F. Supp. 981 (E.D. Wis. 1974); *Smith* v. *Resor*, 406 F.2d 141 (2nd Cir. 1968).

The argument of the petitioners that the normal remedies of damages, injunction or habeas corpus which the courts and Congress usually provide have either not been available or are only of limited availability to military personnel and justify denial of a damage remedy for constitutional violations is without merit.

The petitioners next argue that Congress has specifically provided rememdies for service personnel with grievances like the petitioners under 10 U.S.C. 1552(a)—the Board for the Correction of Naval Records; under 10 U.S.C. 138—filing for a redress of grievances committed by one's commanding officer

and under the naval regulations prohibiting naval racial discrimination.

First, these internal military schemes proposed by the petitioners do not provide any compensatory damage to a service member. No damages can be awarded under 10 U.S.C. 938, nor can the Board for the Correction of Naval Records (BCNR) award any damages, except back pay. This Court in *Carlson* stated that a suit under the Federal Torts Claims Act is not an alternative remedy to a *Bivens* action for the wrongful death of a prisoner, even though it provides compensatory damage. *Carlson* v. *Green*, 446 U.S. at 21.

But there is not the slightest glimmer of any legislative intent that these remedies were intended by Congress to be a substitute for a *Bivens* remedy. The purpose of the creation of the BCNR by Congress was for "avoiding a large number of 'private' bills in Congress by which discharged servicemen sought to have the nature or character or type of discharge certificate corrected . . ." *Suro* v. *Padilla*, 441 F. Supp. 14, 18 (D.R.R. 1976). The act was also intended to correct an individual's service record for errors resulting from military court-martials or Boards of Review and to provide compensation for such errors. *Larinoff* v. *United States*, 365 F. Supp. 140 (D.C. Cir. 1973), *rev. other grounds*, 533 F.2d 1167 (D.C. Cir. 1974), *aff'd.* 431 U.S. 864 (1977). The courts have held that there is no Congressional intention by creating BCNR "that judicial jurisdiction would be affected . . . or to preclude judicial review as authorized by previous court decisions." *Ogden* v. *Zuckert*, 298 F.2d 312, 315 (D.C. Cir. 1961); *Sohm* v. *Fouler*, 365 F.2d 915 (D.C. Cir. 1966); *Seepe* v. *Department of the Navy*, 518 F.2d 760 (6th Cir. 1975).

Even more important, the Board for the Correction of Naval Records does not provide an adequate remedy for constitutional claims of enlisted personnel. Limited financial and personnel resources result in the BCNR ". . . being totally inept at handling with fairness questions such as those raised . . . [involving the Fifth Amendment rights of a Black air-

woman]." *Rew* v. *Ward*, 402 F. Supp. 331, 336 (N.D. N.M. 1975); *Matlovich* v. *Secretary of the Air Force*, 591 F.2d 852 (D.C. 1978). The long delays and the inadequacy of remedies have led many courts to hold that application to the BCNR is no longer a necessary requirement prior to seeking federal court relief for unlawful military administrative or military judicial action. *Vance* v. *United States*, 434 F.Supp. 826 (D.C. Texas 1977); *Odgen* v. *Zuckert*, 298 F.2d 312; *Craycroft* v. *Ferrall*, 397 U.S. 335 (1970); *Parisi* v. *Davidson*, 405 U.S. 34, 38 at fn. 3.

But even more important, the law in this area is that it is not necessary for a member of the military to appear before the BCNR or an administrative agency when constitutional issues are involved. *Beller* v. *Middendorf*, 632 F.2d 788, 801 (9th Cir. 1981), *cert. denied*, 454 U.S. 855 (1982); *Downen* v. *Warner*, 481 F.2d 642 (9th Cir. 1973). It is quite clear to this Court that military boards "as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *O'Callahan* v. *Parker*, 395 U.S. 258, 265. A party need not apply to the BCNR if the relief requested is not within the authority or power of that body. *Hodges* v. *Calloway*, 499 F.2d 417, 420-21 (5th Cir. 1974); *Van Hoffburg* v. *Alexander*, 615 F.2d 633, 640 (5th Cir. 1980).

Finally, Article 138 of the Uniform Code of Military Justice (10 U.S.C. 938) is subject to the same deficiencies as are appeals to the BCNR. But further, it provides no relief for the violation of equal protection and can provide no remedy. *Casey* v. *Schlesinger*, 382 F. Supp. 1218, 1220 (D. Ok. 1974). Further, it only applies to one's commanding officer, which in this case would be petitioner Chappell. None of the other petitioners are covered by Article 138.

But these sections as well as the naval regulations concerning equal opportunity are not equally effective alternative remedies to *Bivens*. The internal remedies will not have any deterrent effect on the petitioners. BCNR procedures do not serve any deterrent effect. They only change incorrect records or reports. Article 138 could have a deterrent effect on one's

commanding officer. But it is highly unlikely that any superior officer reviewing a claim under Article 138 would find for an enlisted man against a fellow officer on an issue of racial discrimination or any other grievance. As general rule, the military chain of command does not operate in that fashion. It functions to uphold the decisions of commanders regardless of their racial impact or discriminatory purpose.

Here again, the federal courts are in a better position to consider the constitutional issues presented than are the remedies under Article 138 referred to by the petitioners. *Committee For GI Rights* v. *Calloway*, 518 F.2d 466, 475.

It is unfortunate but true that the history of race relations in the military is not a matter which can be looked upon with pride. Particularly in the Naval Service, racial prejudice is rampant. And, even when the Navy was directed by the President to increase Black enlistments in 1941, the naval hierarchy itself resisted. What is most significant, however, is that senior officers deemed it to be contrary to "the best interest of general ship efficiency" and "the national defense" to allow Blacks to serve in other than the messman branch. Memorandum from the Chief of the Bureau of Navigation to the Chief of Naval Operations, October 24, 1941 reprinted in MacGregor & Nalty, *supra*, at 11. Of course, in a few short years Blacks were placed in many job titles and integrated into the Navy without any threat to national security or the national interest.

That senior naval officials could perceive that basic steps toward equal treatment of Blacks as a threat to national security is shocking. More troubling, however, is that this perception was apparently sincere and honest. In rather graphic fashion, this demonstrates the unsuitability of entrusting enforcement of basic constitutional provisions to military officials whose perceptions are shaped by their short range problems. Officials need not be degenerate in order to ignore express and fundamental constitutional requirements; they need only have ther outlook limited by their immediate concerns.

But even more important the racial discrimination in the Navy is so pervasive that as late as 1970 Admiral E. Zumwalt, then Chief of Naval Personnel, in speaking of the racial problems in the Navy, was able to say:

> From this group of Black navy men and their wives we learned of discrimination of an order that we had no idea existed . . . We didn't even understand the nature or basis for some of it until we listened to this group. Since then I have seen the transformation not only in myself, but in all those senior personnel who were in the room on that occasion. J.D. Foner, *Blacks and the Military in American History*, 239 (1974).

There can be no doubt that equality of treatment for persons of all races is and has been a fundamental and overriding tenet of our nation. At the same time, the vestiges of discrimination have proven to be particularly resistant and difficult to eliminate. Even if the government's position of complete unaccountability of military officers were not legally unprecedented, claims of racial discrimination would be the most inappropriate area to relegate solely to the internal military system for redress. Although many types of claims may be readily resolvable by the military command, those involving fundamental constitutional provisions, the importance of which are not inherently apparent to those immersed in day-to-day military activities, are particularly ill-suited to final resolution in that forum.[44]

In the final analysis, the government's sweeping claim of absolute unaccountability—no matter how egregious the wrongful conduct of the individual officer, no matter how fun-

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[44] The Black Congressional Caucus in its report on Racism in the Military, found that "formal charges of racial prejudice and discrimination invariably wind up with a whitewash by the serviceman's superiors and a black mark in the victim's military folder. The military probably to a greater extent than any other American institution has built in numerous devices and practices to protect itself from internal and external tremors." Cong. Rec. at 36583.

damental the constitutional violation, no matter how serious or widespread the injury inflicted—is simply unacceptable. Although the government is correct in urging that there is a separation of powers issue implicit in this case, it has incorrectly characterized that issue: the threat is not of the judiciary undermining the military "branch" but rather of the military attempting to extricate itself from the system of checks and balances and eviscerating fundamental constitutional tenets because of an overbroad and unjustified conception of military necessity. If military officers are unchecked by judicial authority, the large scale, systematic violations of the Constitution such as those witnessed in the past are almost certain to recur.

In closing this point, it must be remembered that the equal protection rights of Black enlisted personnel to be free from racial discrimination by their superior officers is a paramount policy of the Constitution. This Court must recognize the right of Blacks to enforce these rights against racist commanders who degrade and demean members of the Black race. Anything less will deny a large group of citizens the rights that they were entitled to by the Constitution and will encourage the resort to self-help to vindicate and to protect themselves from the racial policies of their officers.

E. Black Enlisted Personnel Also Have A Cause Of Action For Damages Against Their Superior Officers Under 42 U.S.C. Section 1985(3).

The respondents also raise a valid cause of action under 42 U.S.C. 1985(3) by alleging in their complaint that the petitioners have conspired to deprive them of rights to skilled rates, honorable discharges, promotions, and their right to be free of racial discrimination guaranteed by the equal protection clause and by the naval regulations (J.A. 3, 8, 10, 12, 14 and 16)

Originally passed in 1871, the Civil Rights Act, also known as the Ku Klux Klan Act, was specifically aimed at state officials and members of the Ku Klux Klan who had terrorized Black people. Congress, in passing this legislation, relied primarily upon the Thirteenth Amendment.

In *Griffin* v. *Breckenridge*, 403 U.S. 88, this Court held that the Civil Rights Act of 1871 [42 U.S.C. 1985(3)] was restricted to conspiracies by persons acting under color of law, as well as private conspiracies, that were directed against Black people and that were the result of racial prejudice. Only conspiracies that violated rights protected under the equal protection clause were covered.

Federal officials can be sued under 1985(3) for violations of equal protection by racially discriminatory acts. *Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926, 931; *Revis* v. *Laird*, 391 F. Supp. 1133 (E.D. Cal. 1975).

Military officers may also be sued under the Civil Rights Act for racial discrimination. *Taylor* v. *Jones*, 653 F.2d 1193 (8th Cir. 1981); *Alvarez* v. *Wilson*, 431 F. Supp. 136, *supra*. The Civil Rights Act, "is a source of statutory protection against racial or ethnic discrimination that is apparently available to uniformed military personnel." Harris, *Protections Against Discrimination Afforded to Uniformed Military Personnel: Sources and Directions*, 46 Mo. L. Rev. 265, 286 (1981).

A person who is made to suffer racial discrimination is deprived of a basic statutory right. Racially discriminatory acts by military officers do not further any military purpose. They only manifest a policy of racial superiority which has no place in the command of the Navy.

When Congress passed this act in 1871, it extended to all Black persons. Black enlisted people in the military, like all other United States citizens, have the right to be free from conspiracies of their superior officers against them, that are motivated by racial prejudice.

The petitioners fail to object to this ground of federal court jurisdiction. So it can be assumed, since it was one of the bases for federal court jurisdiction in this case, that they do not oppose it.

But assuming they raise the same arguments as they do to the *Bivens* remedy, the same countervailing arguments do apply.

Likewise, the respondents have a valid claim under the rubric that a military department that issues valid regulations must abide by such regulations. *Nixon* v. *Secretary of the Navy*, 422 F.2d 934 (2nd Cir. 1970); *Peavy* v. *Warner*, 493 F.2d 748, 750 (5th Cir. 1974); *Denton* v. *Secretary of the Air Force*, 483 F.2d 21, 28 (9th Cir. 1973). Here, the Navy promulgated valid regulations ensuring equality of opportunity and treatment for all military personnel of the Department of the Navy, regardless of race. OPNAV Instruction 5354.1a. But the respondents were never afforded equality of opportunity and treatment by petitioners. Therefore, respondents also state a valid claim for declaratory relief because of the failure of these Naval officials to follow their own regulations.

In conclusion, this Court should recognize that respondents have stated a valid cause of action for racial discrimination under the equal protection component of Due Process, under 42 U.S.C. 1985(3) and under Due Process for violation by naval officials of their own regulations prohibiting racial discrimination by their superior officers.

This Court should affirm the decision of the Court of Appeals and return the case to the federal district courts to review the constitutional claims under the doctrine of reviewability as set forth in *Mindes* v. *Seaman*, 453 F.2d 197, and to review the claims arising under 42 U.S.C. 1985(3) and naval regulations on the merits.

POINT II

A UNITED STATES DISTRICT COURT HAS JURISDICTION TO REVIEW THE VIOLATIONS OF FIFTH AMENDMENT RIGHTS, OF 42 U.S.C. 1985(3), AND OF NAVAL REGULATIONS PROHIBITING RACIAL DISCRIMINATION AGAINST BLACK ENLISTED PERSONNEL BY THEIR SUPERIOR OFFICERS

The Court of Appeal below provided a test to reconcile the problem of reviewing internal military decisions where the plaintiff is alleging a violation of his (her) rights under the

Constitution. The federal district court must first determine whether the action complained of within the military violates the Constitution, and whether the plaintiff has exhausted his or her military remedies. (Pet. App. 7a)

The trial court must then balance four factors to determine whether review on the merits should be granted. The strength of plaintiff's claim, and the potential injury if review is refused, must be balanced against the extent of interference with military functions and the military expertise involved. If the factors are balanced for the plaintiff, the court will move to the merits. (Pet. App. 7a)

This Court is requested to adopt this test because it insures that federal courts will review violations of recognized constitutional rights by military officials, protect individual liberties, and insure that unfounded claims against the military will be eliminated prior to a decision on the merits. Federal courts are often called upon to decide questions of internal military affairs. This method insures orderly processing of these claims. Many of the circuits have adopted the *Mindes* factors cited by the Court of Appeal. It is the most deliberate judicial examination of the subject to this time.[45]

A. Federal Courts Have Power To Review Military Administrative Action For Violation Of Statutory Rights Prohibiting Racial Discrimination.

> "But the Pentagon is not yet sovereign. The Military is simply another administrative agency insofar as judicial review is concerned." *Parisi* v. *Davidson*, 405 U.S. 34, 52 (1972) (concurring opinion of Justice Douglas).

The federal courts have power to grant relief to the action of a federal executive official where the department has exceeded

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[45] Peck, *The Justices and The Generals: The Supreme Court and Judicial Review of Military Activities*, 70 *Military Law Review*, 1 (Fall, 1975). (Report of a high military official in the Pentagon whose belief is that the military is subject to the Constitution).

its statutory authority. *American School of Magnetic Hearing* v. *McAnnulty*, 187 U.S. 94. The interpretation by executive officials of Acts of Congress do not bind the federal courts from reviewing that interpretation or action taken pursuant to that interpretation.

This Court initially reviewed military administrative action taken pursuant to an act of Congress only to determine whether the "military tribunal was acting within the scope of its lawful powers." *Reaves* v. *Ainsworth*, 219 U.S. 296, 304 (1911). Federal courts originally did not review the factual basis for the military action. *United States ex rel. French* v. *Week*, 259 U.S. 336 (1922).

From the earliest this Court ruled that action of the military in inducting and discharging armed services personnel in contravention of a statute could be reviewed because "the case involves the construction of the general statutes of the United States." *Denby* v. *Berry*, 263 U.S. 29, 31 (1923); *Patterson* v. *Lamb*, 329 U.S. 539, 542 (1947); *Billings* v. *Truesdale*, 321 U.S. 542 (1944).

When the military acts within its statutory authority to deny a service personnel an assignment, the federal courts normally do not review such action. But where the military denies a person in the military a particular assignment in violation of a statute, the court does have power to review the action. *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94.

Also in *Harmon* v. *Brucker*, 355 U.S. 579, this Court held that federal courts may review internal military affairs to determine if a military official has acted outside the scope of his powers. This Court stated:

> "Generally, judicial relief is available to one who has been injured by an Act of a governmental official which is in excess of his express or implied powers . . . The District Court not only had jurisdiction . . . but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative dis-

> cretion, and, in such circumstances as those before us, judicial relief from this action would be available." *Harmon* v. *Brucker*, 355 U.S. at 581-582.

This Court in the variable reinlistment bonus cases, *United States* v. *Larinoff*, 431 U.S. 864, held that Naval action changing a reinlistment bonus was in conflict with a Congressional statute and invalid.

Federal district courts may also review internal military administrative activities for compliance with due process and equal protection. *Frontiero* v. *Richardson*, 411 U.S. 677, 690; *Schlesinger* v. *Ballard*, 419 U.S. 498.

Courts also have power to review internal military actions to determine whether there was a violation of the Civil Rights Act. In *Taylor* v. *Jones*, 653 F.2d 1193, the court held that plaintiff, a member of the national guard, was entitled to relief under 42 U.S.C. 1981 for the intentional discrimination that she suffered. Also, in *Alvarez* v. *Wilson*, 431 F. Supp. 136, *supra*, the district court held that a federal district court can review actions of naval officers for conspiracy to deprive a Black service personnel equality of his protection rights under 42 U.S.C. 1985(3).

Based on these authorities, this Court should affirm the decision of the Court of Appeal and return this claim under 42 U.S.C. 1985(3) to the United States District Court to review the matter on the merits. The action of the petitioners was in contravention of 42 U.S.C. 1985(3) and the federal courts must review the violation of respondent's rights thereunder.

B. Federal Courts Must Review Naval Administrative Actions For Violations Of Regulations Intended To Protect Black Enlisted Personnel From Racial Discrimination.

Administrative action of the executive department in violation of their own regulations establishing procedures for a hearing and review are invalid. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Service* v. *Dulles*, 354 U.S. 363, 388 (1957). The head of an executive department

must comply with its own procedural regulations in dismissing an employee. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959).

"Where the military has laid down its own rules and regulations, such rules and regulations cannot be ignored, and courts may examine the order [of military officers] to ascertain whether the military's rules and regulations were violated in a manner resulting in substantial prejudice." *Hall* v. *Fry*, 509 F.2d 1105, 1110; *United States ex rel. Sledgeski* v. *Commanding Officer*, 478 F.2d 1147 (2nd Cir. 1973); *Kohn* v. *Laird*, 460 F.2d 1318 (7th Cir. 1972). Action by military service taken in violation of its regulations is invalid and void. *Geiger* v. *Brown*, 419 F.2d 714 (D.C. Cir. 1969); *Grimm* v. *Brown*, 449 F.2d 654 (9th Cir. 1971); *Antonik* v. *United States*, 445 F.2d 592 (6th Cir. 1971); *Conn* v. *United States*, 376 F.2d 878 (Cl.Ct. 1967); *Peavy* v. *Warner*, 493 F.2d 748, 750; Lunding, *Judicial Review of Military Administrative Discharges*, 83 Yale Law Rev. 33, 53-6.

Military administrative action which involves violations of regulations, statutes or the Constitution can be reviewed by federal courts even though they involve duty assignments. *Committee for GI Rights* v. *Calloway*, 518 F.2d 466 (duty assignment at rehabilitation center); *Hall* v. *Fry*, 509 F.2d 1105 (active duty assignment for reservists); *Moore* v. *Schlesinger*, 3 MLR 2637, 2638 (10th Cir. 1975) (military actions denying fundamental rights resulting in job transfer); *Hagopian* v. *Knowlton*, 470 F.2d 201 (due process right to hearing required prior to expulsion from West Point and transfer to another duty post); *Glines* v. *Wade*, 586 F.2d 675 (9th Cir. 1978) *reversed on other grounds*, *Brown* v. *Glines*, 444 U.S. 348; *Orloff* v. *Willoughby*, 345 U.S. 83 (assignment to medical specialist field required by statute must be complied with by the Army); *Tigue* v. *Swain*, 585 F.2d 909 (8th Cir. 1978) (reviewed exclusion of plaintiff from position involving access to nuclear program); *Mir* v. *Fosburg*, 646 F.2d 342 (9th Cir. 1980); *Taylor* v. *Jones*, 653 F.2d 1193 (removed from recruiter position because of race).

Also, internal military decisions involving promotion are reviewable. *Schlesinger* v. *Ballard*, 419 U.S. 498; *Dilley* v.

Alexander, 603 F.2d 914 (D.C. Cir. 1979); *Vander Molen* v. *Stetson*, 571 F.2d 617.

Internal military decisions involving the basis for determining whether to discharge a person is reviewable if in violation of the law. *Johnson* v. *Reed*, 609 F.2d 784 (5th Cir. 1980); *Hodges* v. *Calloway*, 499 F.2d 417; *Schwartz* v. *Covington*, 341 F.2d 537; *Harmon* v. *Brucker*, 355 U.S. 579; *Denton* v. *Secretary of the Air Force*, 483 F.2d 21.

In this case, the respondents allege violations of the right to equal treatment and opportunity under naval regulations.[45a] They were denied ratings, advancement, training, and unjustly disciplined, subjected to humilitating threats, given adverse and improper performance evaluations, and assigned to menial tasks. All of the actions were taken because of purposeful discrimination by petitioners. These actions should be held reviewable on the merits by the federal district court to determine whether the rights of the respondents were violated under naval regulations. Racial discrimination must not be sanctioned, encouraged or promoted.

C. This Court Should Order That The Federal District Court Apply The *Mindes* Factors To Determine Whether The Claims Of The Black Enlisted Personnel For Racial Discrimination Under The Fifth Amendment Are Reviewable.

This Court has never elaborated standards of reviewability of internal military decisions involving administrative matters where violation of constitutional rights are involved. During the last ten years, this Court has decided numerous cases involving internal military matters but has not elaborated any standards. *Parisi* v. *Davidson*, 405 U.S. 34; *Schlesinger* v. *Ballard*, 419 U.S. 498; *Brown* v. *Glines*, 444 U.S. 348; *Secretary of the Navy* v. *Huff*, 444 U.S. 453 (1980); *United States* v. *Larinoff*, 431 U.S. 864.

[45a] OPNAV INSTRUCTION 5354.1a

The Fifth Circuit opinion in *Mindes* v. *Seaman*, 453 F.2d at 201 is the most comprehensive, elaborate judicial examination of reviewability of military decisions involving allegation of violation of constitutional rights to date.

This test should only be applied to review challenges based on a violation of constitutional rights, and not for violations of statutes or regulations. First, many grievances are only common law torts but they can be alleged in constitutional terms. Constitutional claims are unequal in the scale of values. A hair cut regulation will be different than a conviction and sentence to confinement from a court-martial. See Peck, *The Justices and The Generals, The Supreme Court and Judicial Review of Military Activities*, 70 Mil. L. Rev. 1.

But the balancing test to determine reviewability of constitutional claims is best adapted to both protect the interest of the individual and that of the military.

The *Mindes* test has been followed and applied to determine the reviewability in numerous circuits.[46]

The petitioners oppose this approach of reviewability that has been tried and tested by nearly *every* court of appeal. Their opposition is based on the argument that the military actions

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[46] *Dilley* v. *Alexander*, 603 F.2d 914 (D.C. Cir. 1974); *Vander Mollen* v. *Stetson*, 571 F.2d 617 (D.C. Cir. 1977); *Crawford* v. *Cushman*, 531 F.2d 1114 (2nd Cir. 1976); *Dillard* v. *Brown*, 652 F.2d 316 (3rd Cir. 1981) (only this circuit refused to follow *Mindes*); *Lane* v. *Secretary of the Army*, 504 F. Supp. 39 (D.Md. 1980), *a'ffd.* 639 F.2d 780 (4th Cir. 1980); *Nesmith* v. *Fulton*, 615 F.2d 196 (5th Cir. 1980); *Johnson* v. *Reed*, 609 F.2d 784 (5th Cir. 1980); *Hodges* v. *Calloway*, 499 F.2d 417 (5th Cir. 1974); *Seepe* v. *Department of the Navy*, 518 F.2d 760 (6th Cir. 1975); *ben Shalom* v. *Secretary of the Army*, 489 F. Supp. 964 (D. Wis. 1980); *Taylor* v. *Jones*, 653 F.2d 1193 (8th Cir. 1981); *Denton* v. *Secretary of the Air Force*, 483 F.2d 21 (9th Cir. 1973); *Schlanger* v. *United States*, 586 F.2d 667, 671 (9th Cir. 1978) *cert. denied*, 441 U.S. 943 (1979); *Glines* v. *Wade*, 586 F.2d 675, 678 n.4 *rev'd on other grounds sub. nom. Brown* v. *Glines*, 444 U.S. 348; *Lindenau* v. *Alexander*, 663 F.2d 68 (10th Cir. 1981); *Linfors* v. *United States*, 673 F.2d 332 (11th Cir. 1982).

should be shielded from civilian review because the civilian courts cannot make determinations on military functions and that the service personnel can still bring his superior officer to court for review on the balancing test. (Pet. Brief, 30)

But the *Mindes* balancing test is intended as a compromise to both protect military expertise and also to protect individual constitutional liberties. The federal courts are best determined to undertake that task.

It is incredible that the government in this day and age can argue that military officers should not be subject to the United States Constitution. The reply to this was best stated in *United States* v. *Lee*, 106 U.S. 196, 220 (1882) one hundred years ago, "No man in this country is so high that he is above the law . . . All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

They also argue that it would be improper to have a federal court review the decision of the military if it involves a duty assignment and miscite *Orloff* v. *Willoughby*, 345 U.S. at 93.

This Court in *Orloff* v. *Willoughby*, 345 U.S. 83 ruled that it will review a duty assignment only when it is made in violation of a statutory or constitutional provision. The other broad language it cites in *Orloff* saying that this Court would allow military discrimination against its enlisted members, in this case, is absurd. It would mean that the military could practice racial discrimination with impunity. The government in *Mindes* v. *Seaman*, settled the same argument. The Court there stated:

> "The court could not stay its hand if for example it was shown that only Black men were assigned to combat positions while whites were given safe jobs in the sanctuary of rear echelons." 453 F.2d at 199.

Existing precedent points the way to resolution of this case. Military officers have in the past been held amenable to suit for their wrongful conduct. And, their actions are not insulated from review merely because they take place in a military context. To be sure, military officers are entitled to a measure

of protection, in the form of qualified immunity. Likewise, constitutional provisions may at times, have to be shaped to fit the military environment. But, there is no need nor precedent for erecting a total barrier to suit. As will be demonstrated in the sections to follow, in short, a military officer is amenable to a *Bivens* damage action for racial discrimination albeit with a qualified immunity defense, and the courts must review those actions as stated by the Court of Appeals below.

POINT III

NAVAL OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY ONLY

For almost two centuries, Congress, although undoubtedly invested with power to do so, has refrained from conferring absolute immunity upon military officers. When this Court was invited to intervene and judicially create an intra-military immunity, it declined to erect an absolute barrier to suit. *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 403-404. Yet, despite the historic refusal of both Congress and the Court to absolutely immunize military officers, the government in effect suggests that there is an automatic and complete bar prohibiting all actions against those officers for constitutional violations.

Recognition of an absolute intra-military immunity would be an unprecedent step, not only from an historic but also from a legal and analytical standpoint. As this Court has emphasized in its modern immunity decisions, even high level executive officials can find sufficient breathing room to perform their duties when afforded qualified immunity. At the same time, those officials who tread beyond the wide realm of protection provided by that immunity, and in the process cause injury, are subject to a damage action. It was precisely these considerations which prompted the Court to hold only recently that confidential advisers to the President, like others at the highest level of government, are entitled to a qualified and not an absolute immunity. *Harlow* v. *Fitzgerald*, ___ U.S. ___, 73 L.Ed.2 at 411.

That same analysis, and the balance it strikes, is particularly applicable to the present circumstances. Military officers must be permitted to make legitimate judgments and decisions, free from the spectre of liability. It is crucial, on the other hand, not to grant those officials a license to commit the most flagrant of constitutional violations. The solution which this Court has endorsed in both a civilian and military context, with the tacit concurrence of Congress, is qualified immunity.

A. This Court Should Not Grant Absolute Immunity To Military Officers Absent Congressional Action.

The Constitution gives Congress limited power for making rules for the military. Article I, Section 8 of the Constitution. Congressional power extends to every aspect of military life, including military discipline. It is for the Congress to determine initially whether disciplinary and other considerations necessitate absolute immunity for military officers.

Congress has repeatedly controlled the liability of military officers for damages. Rather than granting absolute immunity, it has traditionally provided for removal of damage suits against federal officers to a federal court.[47] When Congress passed the removal statutes, military officers were subject to liability.

It is especially significant that Congress declined to enact an absolute immunity defense during the Civil War, despite its obvious familiarity with legislating defenses for officers in that era.[48] Only a few short years before the Civil War—in 1848 and 1851—this Court squarely ruled that a military officer was liable to an enlisted man in damages for constitutional and other wrongs. *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 83

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[47] See Act of February 4, 1815, Section 8, 3 Stat. 195, 198-199; Act of March 2, 1833, 4 Stat. 612, 632; and Act of August 29, 1916, Section 3, Article 117, 39 Stat. 169.

[48] The only exception was the absolute immunity passed in 1863 for the duration of the Civil War which was limited to officers whose actions were taken pursuant to Presidential orders. Act of March 3, 1863, Section 4, 12 Stat. 755.

("*Wilkes I*"); *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 ("*Wilkes II*"). And, in those very decisions, the Court likewise refused to recognize absolute immunity for the officers. Although aware of these rulings, and although it legislated in this precise field, Congress took no steps to alter them.

On only one occasion has Congress granted absolute immunity—to medical personnel in the armed forces. 10 U.S.C. § 1089. See *Howell* v. *United States*, 489 F. Supp. 147 (D. Tenn. 1980); *Hernandez* v. *Koch*, 443 F. Supp. 347 (D.C. Cir. 1977). That Congress granted absolute immunity only to military medical personnel demonstrates both its awareness and approval of the *Wilkes* rule of qualified immunity for military officers. For, unless there is potential liability, there would be no need for absolute immunity. And, had Congress desired to preclude liability of military officers generally, it would not have limited the immunity statute to medical personnel.

In sum, although Congress has without question been cognizant of the potential liability of military officers, and although it has enacted absolute immunity for certain personnel and at times created special defenses, it has declined to legislate any across-the-board absolute immunity. Given the unique role of Congress in military affairs, this Court should not now intervene to disturb that congressional judgment.

B. Military Officers Should Be Granted Only Good Faith Immunity Under *Harlow* v. *Fitzgerald*.

Executive officials are not entitled to absolute immunity. It is not critical to their power to exercise discretion and to act decisively. *Harlow* v. *Fitzgerald*, ___ U.S. ___, 73 L.Ed.2d 396, 407; *Butz* v. *Economou*, 438 U.S. 478, 506. They are entitled to a qualified immunity, which is necessary: (1) to deter the officers from violating the Constitution; (2) to provide redress to the injured party, and (3) to avoid "draw[ing] a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Har-*

low v. *Fitzgerald*, 73 L.Ed.2d at 404, 407-8. *Butz* v. *Economou*, 438 U.S. at 504-5. The court emphasized that, "[f]or executive officials in general, our cases make plain that qualified immunity represents the norm." *Harlow* v. *Fitzgerald*, 73 L.Ed.2d at 404.

Petitioners are unable to bring themselves within the recognized categories of absolute immunity under common law or constitutional precedent. Common law precedent opposes absolute immunity for military officers. *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390; *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89: *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). The Constitution and court decisions point to accountability of military officers to judicial review. *Harlow* v. *Fitzgerald*, 73 L.Ed. at 10, *Taylor* v. *Jones*, 653 F.2d at 1196; *Tigue* v. *Swain*, 585 F.2d at 913-914; *Alvarez* v. *Wilson*, 431 F. Supp. at 141. ". . . No military purpose—neither discipline, nor orders, nor readiness for combat— . . . would justify absolute immunity for racially discriminatory acts perpetrated by military officers." *Id.* at 146.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

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APPENDIX

OPNAV INSTRUCTION 5354.1a, March 9, 1978

"It is the policy of the Navy to ensure equality of opportunity and treatment for all military members and civilian employees of the Department of the Navy regardless of race, creed, color, sex or national origin . . . Discrimination resulting in the denial of equal opportunity to any individual will not be tolerated in the Navy."

Office-Supreme Court, U.S.
FILED
APR 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-167

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL,
ET AL., PETITIONERS

v.

VERNON WALLACE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The issue in this case is whether the Court should create one "particular private remedy" for servicemen (*Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982), slip op. 25) — a personal damages action against a superior officer in his individual capacity — when Congress has not affirmatively authorized such relief. Contrary to some of the more extravagant assertions of respondents and the amici, we of course do not suggest that the military "should be removed from the realm of the constitutional process" (LDF Am. Br. 16)[1] or "place[d] * * * above the constitutional law of the

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[1] "LDF Am. Br." refers to the brief of amicus curiae NAACP Legal Defense & Educational Fund, Inc., and "ACLU Am. Br." refers to the brief of amicus curiae American Civil Liberties Union. "LC Am. Br." refers to the brief of amicus curiae Lawyers' Committee for Civil Rights under Law.

land" (ACLU Am. Br. 30). See also Resp. Br. 18, 20 n.27, 35-36, 43-44; LDF Am. Br. 12, 15, 24, 38, 56. Racial discrimination of any form in the military is obviously intolerable.

This case, however, does not concern the substantive constitutional rights of servicemen. Nor does it concern a wide range of remedies available to servicemen. We dedcribed these remedies in our opening brief, where we noted that allegedly unconstitutional conduct by a military commander can be reviewed in court in a proper action for declaratory or injunctive relief. See Pet. Br. 32-35. Accordingly, the repeated assertions of respondents and amici that we would leave servicemen with "no federal remedies against discrimination" (Resp. Br. 10; see *id.* at 21 n.28; ACLU Am. Br. 4, 17) are also plainly incorrect.[2] This case concerns only a single remedy that is particularly inconsistent with military discipline, particularly likely to disrupt the command relationship between servicemen and their superior officers, and particularly likely to give rise to insubstantial claims — lawsuits by servicemen seeking what, in most cases, would be ruinous money judgments.

1. Respondents do not deny that it is for Congress, not the courts, to decide in the first instance what remedies will be provided for constitutional violations. Respondents also acknowledge (*e.g.*, Resp. Br. 28) that the sole source for the constitutional remedy they seek here is a grant of general

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[2]Indeed, respondents frequently group together all possible remedies (*e.g.*, Resp. Br. 26, 44), as if all must be either allowed or disallowed; they suggest, for example, that we would preclude servicemen from "bringing an action to enforce [their] constitutional rights" (*id.* at 36). As we explained in our opening brief, different remedies involve different considerations, and many are entirely acceptable in the military context.

jurisdiction.[3] Every time this Court has created a personal damages remedy for a constitutional violation, it has specifically noted that such a remedy will *not* be created if there are "special factors counselling hesitation in the absence of affirmative action by Congress" (*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); see *Carlson* v. *Green*, 446 U.S. 14, 18 (1980); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979)). In our opening brief, we explained that in the military context, the Court has always been reluctant to create any sort of remedy in the absence of clear congressional authorization. Pet. Br. 15-20. A fortiori, the Court should hesitate before creating a personal damages remedy that plainly has the serious potential to undermine military discipline and the military's vital command relationships.[4]

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[3]Respondents also based their claim on 42 U.S.C. 1985(3). But Section 1985(3) is not a remedy specifically designed for military claims; indeed, as we noted in our opening brief (Pet. Br. 38 n.8), it may not even apply to federal officials at all. Moreover, as even the court of appeals recognized, if the special factors present in the military context preclude an implied constitutional damages action, they also preclude a damages action under Section 1985(3). See Pet. App. 8a-9a n.5; Pet Br. 38 n.8.

Respondents are correct in saying (Resp. Br. 45) that we do not contest the district court's jurisdiction over a Section 1985(3) claim. See 28 U.S.C. 1331, 1343(a)(1). We have, of course, consistently denied that respondents can state a claim under Section 1985(3).

[4]Amicus curiae ACLU (but not respondent) asserts (Am. Br. 9-10 n.5) that we did not raise this argument in the court of appeals. This assertion is incorrect. Our brief in the court of appeals was clear in arguing that servicemen have no implied personal damages remedy against their superior officers for a constitutional violation. For example, we relied on the analogy to *Feres* v. *United States*, 340 U.S. 135 (1950), in urging that "not all causes of action available to private citizens are available to servicemen" (Br. 11), and that because of the disruption that results from litigation in the military context, a constitutional claim against individual military officers should not be allowed (Br. 12). We also supported this argument by identifying the alternative remedies available (Br. 15). Our petition for rehearing refined our

Although the relationship between the courts and Congress is therefore at the heart of this case, the briefs of respondents and amici barely discuss the respective roles of Congress and the courts in deciding how servicemen shall be permitted to call their superior officers to account. Instead, respondents and amici invite the Court to create a remedy by "strik[ing] a fair balance" (LC Am. Br. 4) among such matters as the "heroic" as opposed to the "managerial" approach to military discipline (*e.g.*, Resp. Br. 29-32); the prevalence of racial discrimination in the armed forces; the relative risks of disaffection among servicemen who cannot sue their superiors for damages and disruption of discipline if they can (*e.g.*, Resp. Br. 32-35; LDF Am. Br. 38-40); the willingness of the military to police itself, and the efficacy of the remedies provided by Congress; and the extent to which military life has come to resemble civilian life. These are plainly judgments that Congress is better suited to make. In addition, if this Court were to create an implied damages remedy, lower courts and juries, in deciding particular cases, would again have to balance the needs of discipline against the claims of servicemen — for example, in considering the four factors enumerated by the court of appeals, in deciding whether an officer is entitled to qualified immunity, and in assessing damages. Their decisions would undeniably have a profound effect on the willingness of superior officers to issue orders that stir resentment or place servicemen in jeopardy. But "the rights of men in the armed

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argument further and presented it in terms similar to those we use here, relying, for example (Pet. for Reh. 7-8) on the discussion of "special factors" in *Carlson* v. *Green* — a case that had not been decided when our court of appeals brief was filed — and the Third Circuit's decision in *Jaffee* v. *United States*, 663 F.2d 1226 (1981) (en banc), cert. denied, 456 U.S. 972 (1982).

The ACLU is also incorrect in saying that this is a jurisdictional issue. See, *e.g.*, *Carlson* v. *Green*, *supra*, 446 U.S. at 17 n.2.

forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are *not* the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion; emphasis added; footnote omitted). See also *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

Respondents and amici attempt to argue that by not explicitly exempting military officers from personal damages suits, Congress has expressed a judgment that such suits should be permitted. *E.g.*, LDF Am. Br. 26-27. But this Court has repeatedly created immunities in the absence of explicit congressional authorization, even when Congress explicitly provided the cause of action — as, of course, it has not here. See *Imbler* v. *Pachtman*, 424 U.S. 409, 417-419 (1976). Moreover, as we explained in our opening brief, with the exception of the court of appeals' decision in this case and a single district court decision that is on appeal, we know of no court that has permitted a serviceman to sue his superior officer for damages in modern times. See Pet. Br. 14-15. This trend has continued since we filed our opening brief. *Jones* v. *Reagan*, 696 F.2d 551 (7th Cir. 1983). See *id.* at 555 ("This does not mean that the military is 'above the Constitution.' It just means that in the circumstances of this case these plaintiffs have no damages remedy in federal court against their military superiors.").[5] Although respondents quarrel with us over the facts of

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[5]Respondents repeatedly cite *Taylor* v. *Jones*, 653 F.2d 1193 (8th Cir. 1981), which they describe as "one of the most important decisions" in this area (Resp. Br. 26; see *id.* at 7, 22). But *Taylor* was a suit against the head of a state national guard, who was appointed by the governor of the state, and the court specifically noted that the plaintiff "has not sought to impose individual and personal liability on [the defendant] for the deprivation of federal rights" (653 F.2d at 1205).

some of the lower court decisions we cite, incorrectly suggesting (*e.g.*, Resp. Br. 23-24 n.31) that they all involved only allegations of negligence, respondents and amici are unable to cite any modern decision that has permitted a damages action by a serviceman against his superior officer. In these circumstances, Congress's failure to enact legislation precluding such suits scarcely amounts to an endorsement of them.

At the same time, there is no reason to doubt that Congress has been well aware of allegations of racial discrimination and other unconstitutional action by military officers. And Congress has provided remedies, which we detail in our opening brief. But these remedies, which permit judicial review without undermining military discipline, do not include a personal damages action by servicemen against their superiors. See also page 10, *infra*.

For these reasons, *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849), on writ of error after a new trial, 53 U.S. (12 How.) 389 (1851), on which respondents and amici rely so heavily, is, as we explained (Pet. Br. 39-40), of little help to them. *Wilkes* involved a common law claim.[6] It was decided at a time when federal courts were thought to have general common law powers in many areas. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963) ("As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*, 304 U.S. 69 [1938]."). Consequently, the principal issue in this case — whether the

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[6]Contrary to amicus curiae LDF (Am. Br. 36, 46), *Wilkes* was not based in any part on the the Eighth Amendment, of which the opinions make no mention. If *Wilkes* had been based on the Constitution, it would have resolved the question left open by *Bell* v. *Hood*, 327 U.S. 678 (1946), and answered by *Bivens*.

Court should create an implied damages action for servicemen against their superiors in the absence of affirmative congressional authorization — simply was not presented in *Wilkes*.[7]

2. Respondents and several of the amici assert that the military is no different from many civilian organizations —in particular, prisons — for purposes of creating an implied damages remedy. See, *e.g.*, Resp. Br. 29-32; LDF Am. Br. 49 n.35; ACLU Am. Br. 47; LC Am. Br. 13, 20-22. The suggestion that servicemen must be allowed to bring personal damages actions because prisoners can is foreclosed by *United States* v. *Muniz*, 374 U.S. 150 (1963), which held that prisoners may sue under the Federal Tort Claims Act; *Muniz* distinguished *Feres* v. *United States*, 340 U.S. 135 (1950), which held that servicemen may not

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[7]There is also reason to believe that *Wilkes* was inconsistent with the prevailing common law view. See, *e.g.*, *Barr* v. *Matteo*, 360 U.S. 564, 580-581 (1959) (Warren, C.J., dissenting); *Wright* v. *White*, 166 Or. 136, 148, 110 P.2d 948, 952-953 (1941) (absolute immunity for military commanders sued in tort by subordinates "has been incorporated into the common law of this country"). See also Pet. Br. 22, 27.

In addition, respondents do not explain why the Court should ignore the fact that *Wilkes* was decided at a time when the military lacked comprehensive internal remedial mechanisms and litigation posed less of a threat. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687 (1979) ("[P]resent times are litigious ones."). See also *Sellars* v. *Procunier*, 641 F.2d 1295, 1300 n.8 (9th Cir. 1981):

> In 1869, Chief Justice Cockburn flailed the doctrine of judicial immunity in his dissent in *Dawkins* v. *Lord Paulet*, L.R.S.Q.B. 94 (1869). He wrote: "I am persuaded that the number of such actions [against judges] would be infinitely small and would be easily disposed of." *Id.* at 110. While the Chief Justice's argument may have had force in 1869, we do not believe it would be realistic in today's litigious era to discount the enormous burden and systemic costs that permitting civil rights suits against judges would impose on both the judge sued and on the federal courts themselves.

bring FTCA actions, principally on the ground that military discipline and prison discipline have entirely different requirements. See 374 U.S. at 162-163.

In any event, the comparison between prisons and the military is misconceived. Both the government's institutional interests and political pressures ensure that the government will pay careful attention to the well-being of its servicemen. More important, military discipline is not simply a matter of imposing order and preventing disruption. Rather, it involves "ingrain[ing] * * * reflexes" (*Department of the Air Force* v. *Rose*, 425 U.S. 352, 368 (1976)) and developing the relationships of loyalty and command that prepare people for the unique situation of combat. As we explained in our opening brief, military discipline in this sense is incompatible with the attitudes and habits of thought fostered by the availability of civil damages litigation — in which every serviceman can look on an officer whose orders aggrieve him as a potential defendant, able to be haled into court and threatened with prolonged litigation and massive liability.

It is also an error to believe that because some of the tasks performed by some members of the military resemble civilian tasks, the needs of military discipline and preparedness can be neglected. As this Court has repeatedly emphasized, "[t]he differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' " *Parker* v. *Levy*, 417 U.S. 733, 743 (1974), quoting *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). This vital difference has, of course, survived any changes in technology or in theories of management, and it exists as clearly today as it has throughout history.

3. Respondents and amici, citing cases in which civilians were permitted to sue military officers (*e.g.*, *Bates* v. *Clark*, 95 U.S. 204 (1877); *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1852); *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804); cf. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974)), assert that we are attempting to make officers absolutely immune from all suits growing out of their official duties. See, *e.g.*, ACLU Am. Br. 48-51. As we made entirely clear in our opening brief, however, our concern here is only with *servicemen's* suits against their superiors. See, *e.g.*, Pet. Br. 35-37. We do not contend that military officials are absolutely immune from all suits related to official duties, whether brought by servicemen or civilians. But, as we explained in our opening brief (Pet. Br. 36-37), the policies that, under this Court's decisions, will justify an absolute immunity plainly do require that superior officers be held absolutely immune from servicemen's suits for damages, in the absence of clear congressional authorization.

4. Finally, respondents and amici discuss in much detail the history of racial discrimination by the armed forces. *E.g.*, Resp. Br. 12-17, 42-43; LDF Am. Br. 4-12. It is, of course, fortuitous that the constitutional claim in this case is one of racial discrimination. The court of appeals did not purport to limit its ruling to such claims, and analytically it could not have done so. Our concern is not simply with race discrimination suits; the court of appeals has authorized personal damages actions by servicemen against superior officers for a wide variety of alleged constitutional violations. Moreover, the discussions of respondents and amici on race discrimination are principally historical, not contemporary, and it is simply incorrect to assert that the military is rife with discrimination today.[8] Nonetheless, we

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[8]See, *e.g.*, M. Binkin and M. Eitelberg, *Blacks and the Military* 11 (The Brookings Institution 1982) ("Today the U.S. military establishment stands in sharp and favorable contrast with other institutions in American society in making headway against racism.").

offer three observations on the problem of racial discrimination in the military and its relevance to this case.

First, if Congress believed that a damages action was the best means of extirpating racial discrimination in the military, it would almost certainly have enacted such a remedy. In 1972, Congress, explicitly concerned about racial discrimination against civilian federal employees, extended Title VII of the Civil Rights Act of 1964 to them. See 42 U.S.C. 2000e-16. Congress also made a Title VII suit — which is brought against the government, not against an individual official — the exclusive remedy for federal civilian employees alleging racial discrimination. See *Brown* v. *GSA*, 425 U.S. 820 (1976). Congress excluded servicemen from the Title VII remedy. See Pet. Br. 38 n.8.

Under no plausible view of congressional intent can it be argued that Congress meant to allow civilian employees to sue only the government for racial discrimination while leaving servicemen free to bring vastly more disruptive (and less efficacious; see pages 10-11, *infra*) suits against individual officers. Nor is it likely that Congress, while carefully designing elaborate remedies for discrimination against civilians, simply overlooked what respondents describe as the notorious problems of racial discrimination in the military. The most plausible inference is that Congress believed that the remedies it expressly designed for the military, when combined with the military's extensive efforts to police itself, were the appropriate remedial approach in the military context.

Second, respondents and amici repeatedly speak of entrenched and systemic racial discrimination. See, *e.g.*, Resp. Br. 42-43; LDF Am. Br. 12. By this they apparently mean that discrimination in the armed forces is the result not of the aberrant acts of individuals but of practices not traceable to any identifiable individual decision. But to the

extent this is true, individual damages actions are necessarily a poor way of attacking the problem.[9] The threat of such an action is likely to have a chilling effect on a commanding officer who is considering whether to give an order that will be resented, but imposing liability on a few individuals will not make much headway against discrimination of the form described by respondents and amici. Systematic approaches, such as the Navy's Equal Employment Opportunity regulations, are far more promising.

Finally, we fully agree with respondents and amici that racial discrimination in the armed forces can seriously damage morale. Congress, undoubtedly, is aware of this fact as well. But this is not an argument for a judicially created remedy. On the contrary, in view of the strong institutional interest that Congress and the military itself have in rooting out discrimination, Congress's demonstrated capacity and willingness to devise remedies for racial discrimination in public employment, the Navy's comprehensive internal mechanisms for combating racial discrimination, the progress already made against race discrimination in the military, the relative ineffectiveness of the personal damages remedy respondents propose, and the serious costs that such a remedy would have in the military context, it is entirely clear that the Court should not supplement the existing remedial scheme by creating a personal damages remedy in the absence of affirmative action by Congress.

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[9]For example, some of the discriminatory acts alleged by respondent Wallace (see Resp. Br. 3; J.A. 27) are attributed not to petitioners but, apparently, to anonymous enlisted servicemen.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

APRIL 1983

DOJ-1983-04

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Office-Supreme Court, U.S.
FILED
FEB 7 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-167

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

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INTEREST OF AMICUS*

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the guarantees of racial fairness inherent in the Fifth Amendment. This case poses significant issues concerning the enforceability of basic constitutional guarantees of racial equality in a military setting. Since constitutional rights without adequate remedies are a mere form of words, the ACLU submits this brief amicus curiae in support of the historic powers of the Article III judiciary to grant traditional remedies to vindicate constitutional rights of persons in military service.

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*Written consents to the filing of this brief amicus curiae have been granted by all parties and have been lodged with the Court.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Plaintiff-respondents were black enlisted men on board the U.S.S. Decatur who allege that defendant-petitioners discriminated against them because of their race in regard to duty assignments, training and ratings that would enable them to advance, and advancement itself; and that these acts not only handicapped them in the Navy but in their potential employment opportunities in civilian life. (JA 3).[1]

The United States District Court for the Southern District of California dismissed the complaint, stating, "1. That the actions complained of are nonreviewable military decisions; 2. That public

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1. The affidavit and papers filed in support of a motion for a preliminary injunction also specified various instances of racial slurs and harassment (JA 21, 27-29, 30-31, 38).

policy compels that the defendants be entitled to intra-service immunity; 3. That the plaintiffs have failed to exhaust their administrative remedies.". (Pet. App. 22a). The Court of Appeals for the Ninth Circuit reversed. (JA 1a, 20a, 22a). The Ninth Circuit held, first, "that the district court erred in dismissing for failure to exhaust administrative remedies ... as the record reveals an apparent factual dispute" on this issue. (JA 3a, n.2). The Circuit Court suggested the submission of additional evidence on this issue before further proceedings in the district court, recognizing that exhaustion is a prerequisite for judicial review. (JA 7a, 10a-11a).

The Circuit Court construed respondents' right to bring an action under 42 U.S.C. § 1985(3) for a violation of equal protection as co-extensive with their right to bring an action pursuant to

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). (JA 2a, n.1; 8a, n.5). It then considered whether Bivens-action review should be allowed for "claims arising incident to military service" concluding that "reviewability ... must reflect a careful balancing of policy considerations". (JA 5a-6a). As a basic limitation, the Court held that review must be confined to alleged violations of a "'recognized' constitutional right .... The allegations must amount to more than a traditional state court claim". (JA 10a, see also 7a and 9a, n.5). The Court pointed out that Feres v. United States, 340 U.S. 135 (1950), on which petitioner-defendants relied, was inapplicable to such a constitutional violation. (JA 13a, 16a, n.9).[2] In addition, adopting tests

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2. In the court below petitioners argued that under Feres they were entitled to absolute immunity (JA 13a); in this Court they rely on the case as a basis for disallowing a Bivens action. (Pet.Br. 17).

outlined in Mindes v. Seaman, 453 F.2d 197, 201-202 (5th Cir. 1971), the Court held that other factors in determining reviewability are "the nature of the plaintiff's interest and the potential injury to the plaintiff if review is withheld; ... the extent of interference with military functions; ... [and] the extent to which resolution of the claim requires military expertise." (JA 11a). Holding that respondents' claim of willful racial discrimination satisfied the Mindes tests, the Court rejected petitioners' claim of absolute immunity, relying on the opinion in Butz v. Economou, 438 U.S. 478 (1978) that though qualified immunity should be the general doctrine in regard to constitutional violations, there should be "an exception however, for cases in which absolute immunity 'is essential for the conduct of the public business.' 438 U.S. at 507 ... " (JA 12a).

In considering whether such an exemption should be made for the military, the Ninth Circuit noted:

> In Dinsman v. Wilkes, 53 U.S. (12 How.) 390, 13 L.Ed. 1036 (1851), the Supreme Court allowed only qualified immunity from liability in connection with an internal military decision .... The reference in Economou to Dinsman*, 438 U.S. at 492-94, 98 S.Ct. at 2903-2904, indicates that the fact that the constitutional claim was incident to military service would not necessarily preclude recovery. (JA 13a-14a) (footnote omitted).

The Court concluded that "creating an exception to those two holdings" (JA 14a) by affording absolute immunity, was unwarranted for "military decisions made in a noncombat setting in peacetime." (JA 15a, 16a n.10).

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*The Economou opinion referred to Wilkes v. Dinsman, 48 U.S. (7 How) 83, 131 (1849), the Court's first opinion in the case, which arose again in 1851 on writ of error after new trial, 53 U.S. (12 How.) 390 (1851).

SUMMARY OF ARGUMENT

Since respondents allege a classic violation of a clearly established constitutional right, this case falls within the subject matter jurisdiction of a federal district court, which is presumptively empowered to grant traditional remedies, including compensatory damages, to vindicate constitutional rights. No basis exists to suggest that Congress wishes to deny the federal courts traditional remedial powers in constitutional cases involving military officials, since Congress has granted jurisdiction to federal courts to enforce constitutional rights in the military in other contexts. Congress' decision to rely on a no-fault mechanism for compensating military tort victims does not imply a desire to preclude Article III courts from entertaining damage claims in cases alleging a violation of an established constitutional right for which no clear

tort analogue exists. Finally, no basis exists for a blanket grant to military officials of absolute immunity from damages for violating constitutional rights. A qualified immunity is sufficient.

ARGUMENT

INTRODUCTORY STATEMENT

This case poses the question of whether a member of the armed forces of the United States may, in time of peace and in a non-combat setting, seek redress in an Article III court for damages suffered as a result of willful racial discrimination allegedly[3] inflicted upon him or her by a superior in violation of the Fifth Amend-

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3. Since the district court dismissed respondent's complaint on its face, the factual allegations of the complaint which allege willful racial discrimination must be taken as true at this stage of the litigation.

ment.[4] The Solicitor General argues that no Article III remedy is available to a military victim who has been injured by willful racial discrimination, first, because Congress has not explicitly authorized an Article III court to entertain a constitutional damage claim against a military defendant and, second, because military officials are entitled to absolute immunity from damage actions by subordinates for unconstitutional conduct.[5]

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4. The case does not challenge the requirement that military remedies be exhausted. Cf. Schlesinger v. Councilman, 420 U.S. 738 (1975). Since a serious factual question appears to exist as to whether plaintiffs have exhausted their military remedies, plenary review by this Court of an important issue of law touching on the relation between military and civilian authority may well be premature.

5. In the lower courts, the government's principal argument was based on an assertion of absolute immunity. In this Court, the emphasis has been shifted to whether an Article III court may entertain a damage claim against a military official for unconstitutional behavior in the absence
(footnote continued on following page)

Neither contention can withstand analysis.

The basic principle underlying the decision of the court below is unarguable: the supremacy of constitutional rights over military discretion and of civilian over military authority. See Hirabayashi v. United States, 320 U.S. 81 (1943); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 21-28 (1866); see also, Davis v. Passman, 442 U.S. 228, 242 (1979): "justiciable constitutional rights are to be enforced through the courts ... unless such rights are to become merely precatory..."

In the instant case the only method for judicial vindication of the Fifth Amendment guarantee of equal protection

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(footnote continued from preceding page) of explicit congressional authorization. It does not appear, however, that the government argued the Bivens issue in the court below, raising a question as to the jurisdiction of this Court to consider it. Harlow v. Fitzgerald, - U.S. - 73 L.Ed 396, 411, n.36 (1982).

against racial discrimination is an action for damages against the officials who allegedly committed the constitutional violation. The situation is the same as that in Davis: "...[T]here are available no other alternative forms of judicial relief. For Davis as for Bivens, 'it is damages or nothing'". Davis, supra, 442 U.S. at 245. See also Harlow v. Fitzgerald, 73 L.Ed.2d 396, 407-8 (1982) ("an action for damages may offer the only realistic avenue for vindication of constitutional guarantees").

I. ARTICLE III COURTS MAY GRANT TRADITIONAL COMPENSATORY DAMAGE REMEDIES IN CONSTITUTIONAL CASES WITHIN THEIR JURISDICTION IN THE ABSENCE OF A CONGRESSIONAL INTENTION TO DEPRIVE THEM OF A PARTICULAR REMEDY.

As Justice Frankfurter noted in Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 261 (1951)(Frankfurter, J., dissenting):

> "Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies ..."

Accordingly, where Congress has granted a federal district court subject matter jurisdiction over a claim arising under the Constitution,[6] this Court has repeatedly recognized judicial power to grant a successful litigant the "familiar remedies" of prohibitory injunction[7] and compensatory damages.[8] Thus, in Bivens,

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6. Jurisdiction is conferred by 28 U.S.C. § 1331. See Davis v. Passman, 442 U.S. 228, 231 (1979).

7. Ex parte Young, 209 U.S. 123 (1908) and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) are, perhaps, the two most celebrated grants of prohibitory injunctions in the absence of congressional authorization. In each case, subject matter jurisdiction was granted by 28 U.S.C. § 1331. In each case, the cause of action for equitable relief was premised directly on the Constitution.

8. See generally Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); Davis v.
(footnote continued on following page)

this Court recognized that Article III courts were empowered to award compensatory damages to plaintiffs who properly invoked their subject matter jurisdiction and who proved that federal officials had injured them in violation of the Fourth Amendment. Similarly, in Davis v. Passman, this Court ruled that federal courts were empowered to award damages against a member of Congress who was alleged to have discriminated on the basis of sex in violation of the Fifth Amendment. Finally, in Carlson v. Green, this Court upheld the power of a district court to award damages to a federal prisoner who was injured in violation of the Eighth Amendment. In each of Bivens, Davis and Carlson, federal

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(footnote continued from preceding page) Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980).

defendants earnestly argued that the lack of an explicit congressional statute authorizing an award of compensatory damages precluded the grant of relief. In each case, however, this Court rejected the attempt to blur the classic distinctions among subject matter jurisdiction, cause of action and remedial power which are central to the Bivens analysis. Where an Article III court is vested with uncontested subject matter jurisdiction and where, as here, a plaintiff has pleaded facts which, if true, make out an established constitutional cause of action, the government's suggestion that the "familiar remedy" of compensatory damages is unavailable in federal court must rest on more than an invocation of a talismanic immunity of the military from judicial

review.[9] Indeed, of all the institutions in American life, none is in greater need of a degree of judicial review to assure that the necessary application of military discipline does not degenerate into lawless tyranny. Where a plaintiff must exhaust military remedies before seeking judicial redress of his constitutional

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9. The government carefully refrains from discussing the question of whether a federal court would be empowered to enjoin racially discriminatory activity by the military. Presumably, even the Solicitor General would recognize the power of the Article III judiciary to enjoin a return to racially segregated military installations. In fact, Article III courts routinely entertain claims for equitable relief from allegedly unconstitutional military activity. E.g. Flower v. United States, 407 U.S. 197 (1972); Brown v. Glines, 444 U.S. 348 (1980); Greer v. Spock, 424 U.S. 828 (1976). While this Court was sympathetic to the substantive positions argued by the military in Brown and Greer, no question was raised as to the power of a federal court to grant equitable relief. If, as Justices Brennan and Harlan noted in Bivens, a federal judge is empowered to issue injunctive relief to enforce a litigant's constitutional claim, it is difficult to understand why the other traditional remedy -- compensatory damages -- is not also available. 403 U.S. at 396-97, 404.

grievances,[10] and where relief is confined to established constitutional claims raised in peacetime and in a non-combat setting, a traditional compensatory damage remedy does not threaten any legitimate military interest, while preserving the minimum degree of constitutional enforcement necessary to the continued existence of the rule of law.

Far from indicating hostility to judicial enforcement of constitutional standards in the military, Congress has consistently recognized that Article III courts should exercise final authority

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10. Requiring exhaustion of administrative remedies as a precondition to a Bivens claim is, itself, a major accomodation to military necessity, since constitutional litigants are not required to exhaust administrative remedies prior to suit.

Since respondents claim to have exhausted their military remedies, the extent to which exhaustion is required is not an issue in this case.

over military activity which impinges upon constitutional rights.

First, Congress has provided for an internal review mechanism culminating in the Board for the Correction of Naval Records, the decisions of which are reviewable in Article III courts. See 10 U.S.C. § 1552; 32 C.F.R. 723. While the limited remedies available before the Board do not provide an adequate substitute for a Bivens remedy,[11] congressional provision for Article III review of the Board's findings evidences a clear recognition that internal military resolution of serious legal claims should be subject to a degree of civilian judicial review.

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11. The Board is authorized to grant back pay awards, but not compensatory damages generally. See Carlson v. Green, supra.

Second, Congress has long provided for habeas corpus review of military decisions affecting constitutional rights. E.g. Burns v. Wilson, 346 U.S. 137 (1953); Parker v. Levy, 417 U.S. 733 (1974); Orloff v. Willoughby, 345 U.S. 83 (1953); Toth v. Quarles, 350 U.S. 11, 22 (1955); Harmon v. Bruckner, 355 U.S. 579 (1958); Parisi v. Davidson, 405 U.S. 34, 44 (1972); Middendorf v. Henry, 425 U.S. 25, 38, 44 (1976); Hiatt v. Brown, 339 U.S. 103 (1950). A serviceman's redress against his superior for violation of a constitutional right is consistent with holdings that the courts limit review of military decisions to the question of whether the military was acting within its lawful authority (see Pet. Br. 18-20; French v. Weeks, 259 U.S. 326 (1922) as to this limitation). For, an unconstitutional act must be "viewed as not authorized" (Butz v. Economou, 438 U.S. 478, 490-91

(1978)). While Article III courts, in exercising habeas corpus review over the military, have been cautious in deferring to military expertise in non-constitutional settings, it is clear that Congress, in granting habeas corpus jurisdiction, has vested the Article III judiciary with the power and the duty of assuring that the Constitution is respected within the armed forces.

Third, Congress has provided for Article III review of the constitutionality of military activity pursuant to the traditional mechanism of actions for injunctive relief directed at an allegedly unconstitutional military decision. E.g. Flower v. United States, 407 U.S. 197 (1972); Brown v. Glines, supra; Greer v. Spock, supra. Schlesinger v. Ballard, 419 U.S. 498 (1975).

Since Congress has vested the Article III courts with explicit power to review the Board for the Correction of

Naval Records and with habeas corpus and federal question jurisdiction over the military in constitutional cases, the Solicitor General can hardly argue that Congress has expressed an intent to preclude the federal courts from performing their traditional role as guardians of the Constitution in this case merely because the defendant happens to be a member of the armed forces. Instead, the Solicitor General seeks to draw a false analogy between tort law and constitutional law in arguing that Feres v. United States, 340 U.S. 135 (1950) precludes the recognition of a Bivens claim against a military superior. Feres is not, however, authority for precluding an action against an individual military defendant for damages flowing from the violation of an established constitutional right to be free from willful racial discrimination.

The decisions dismissing suits for damages by servicemen against their superiors (cited in Pet. Br. 14-15, 37) are consistent with the decision of the court below and maintenance of a Bivens action herein. This body of cases consists of personal injury tort actions, typified by Calhoun v. United States[12] (cited in Pet. Br. 15), discussed with approval by the court below. (Pet. Br. 9a-10a).

The Court recognized that Calhoun and similar cases expressed an "understandable concern that a clever pleader can often transform the most innocuous

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12. 475 F. Supp. 1 (S.D. Cal. 1977), aff'd, 604 F.2d 647 (9th Cir. 1979) (adopting opinion of district court), cert. denied, 444 U.S. 1078 (1980). The exception to the statement in the text as to the petitioners' citations, is Birdwell v. Schlesinger (Pet. Br. 15), which dismissed an action for damages for a discharge from the Air Force but which, contrary to petitioners' implication, accorded the commandant only qualified immunity. 402 F. Supp. 710, 718 (D. Colo. 1975).

state tort action into a claim of constitutional status" (Pet. App. 10a).[13] To meet this problem it held that only a "'recognized' constitutional right" could ground a reviewable claim; and that "the allegations must amount to more than a traditional state law claim" (Pet. App. 10a). Without violence to the intent of the court below but utilizing this Court's subsequent language in Harlow v. Fitzgerald, supra, the criterion of a valid cause of action should be reworded to include an alleged violation of a "clearly established ... constitutional right." (73 L.Ed.2d at 410).

The reason for concern about artful pleading of a constitutional injury rather

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13. Compare Davis, 442 U.S. at 248: the Bivens plaintiff "must first demonstrate that his constitutional rights have been violated. We do not hold that every tort by a federal official may be redressed in damages."

than merely a tort, is that this device would circumvent the rule in Feres v. United States, 340 U.S. 135 (1950). Feres is uniformly deemed applicable to suits against other servicemen as well as suits against the United States under the FTCA (see cases cited by Pet. Br. 14-15, and decision of court below, Pet. App. 13a; 15a-16a, n.9).

Saying that the Federal Tort Claims Act "should be construed to fit ... into the entire statutory system of remedies against the Government ... " (340 U.S. at 139), the Feres Court stressed Congress' establishment of a system of benefits specifically for those in the armed services (340 U.S. at 144) -- a compensation system viewed as reasonable. (340 U.S. at 145).[14]

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14. No-fault compensation by the United States to servicemen, veterans and their survivors for any disability suffered "in
(footnote continued on following page)

However, racial discrimination against a serviceman is not compensable or remediable under the Veterans Benefit Act or any other legislation, nor does it give rise to a traditional tort action. For these reasons as well as the irrelevance to a constitutional claim of the other considerations in Feres (see summary of Feres by court below, Pet. App. 15a-16a, n.9)[15] the

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(footnote continued from preceeding page)
the line of duty" (38 U.S.C. §§ 11, 310, 321,331, ff.), has been emphasized in a number of the cases dismissing complaints against military superiors, cited by petitioners. E.g., Jaffee v. United States (Pet. Br. 14), 663 F.2d 1226, 1237 (3rd Cir. 1981); Laswell v. Brown (Pet. Br. 14) 683 F. 2d 261 (8th Cir. 1982) at ; Lombard v. United States (Pet. Br. 15) 690 F.2d 215, 220-21 (D.C. Cir. 1982). See also Hatzlachh Supply Co. v. United States, 444 U.S. 460, 464 (1980).

15. The dictum relating Feres to military discipline originated in United States v. Brown, 348 U.S. 110, 112 (1954), where it was used to distinguish Feres and permit FTCA recovery to a prisoner. In Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 672-73 (1977), (Marshall, J. dissenting), denying a third-party claim against the United States for
(footnote continued on following page)

ruling of the court below is entirely consistent with Feres.

The court below's exclusion from Bivens actions of "a traditional state law claim" and inclusion of only a "recognized" (or clearly established) constitutional right, not only prevents circumvention of Feres but also is likely to exclude claims whose determination may require military expertise -- such as claims based on injuries incurred in training or maneuvers. And claims arising in "a combat setting" are entirely excluded from the ruling below (Pet. App. 16a, n.10).[16]

(footnote continued from preceding page) negligence in the manufacture of military planes, Justice Marshall noted that third-party recovery would, equally with a direct suit against the United States, involve "second-guessing military orders" and intra-military testimony. However, it must be observed that these occurrences are routine in court martials, which are a regular part of military affairs.

16. The court below also ruled that one factor determining reviewability is "the extent to which resolution of the claim requires military expertise." (Pet.App. 11a).

In sum, a Bivens-action is appropriate because the court below established a feasible limitation to prevent abuse of this critical method of redressing the violation of the established constitutional rights of servicemen by their superiors.

Moreover, as this Court has made clear since United States v. Lee, 106 U.S. 196 (1882), sovereign immunity does not shield a government employee who acts beyond the scope of his constitutional powers. Such an employee acts, not as an agent of the sovereign, but as an individual. Thus, in the case of constitutional violations by a military official, Feres and the Federal Tort Claims Act are irrelevant because the individual defendant has no sovereign immunity to waive. Whatever the validity of Feres in the tort area (where an alternative no-fault scheme was available), the paramount importance of vindicating constitutional rights, argues

strongly in favor of judicial enforcement of constitutional rights in this case.

Finally, and most tellingly, Feres did not purport to bar all tort suits against military defendants -- merely actions against the United States. While traditional sovereign immunity doctrine grants an individual government defendant the cloak of sovereign immunity in many tort settings, no such cloak is available to an official defendant charged with unconstitutional, as contrasted with merely tortious activity; or to a defendant charged with willful tortious activity clearly beyond the scope of his official duties. In such cases, the governing rule in cases against military superiors is not to be found in Feres or the Federal Tort Claims Act, but in Wilkes v. Dinsman, 48 U.S. (7 How.) 83 (1849), (on writ of error after new trial) 53 U.S. (12 How.) 390 (1851), which recognizes the existence of a claim against a military superior for willful tortious

behavior beyond the scope of his official duties. See also Henderson v. Bluemink, 511 F.2d 399, 403-404 (D.C. Cir. 1974); Bissell v. McElligot, 369 F.2d 115 (8th Cir. 1966), cert. denied 387 U.S. 917 (1967).

Thus, Congress' desire to avoid intra-military negligence actions in the wake of the Federal Tort Claims Act does not provide persuasive authority for denying a federal court power to remedy violations of a constitutional magnitude. If, as Wilkes v. Dinsman holds, a claim for willfully tortious activity would lie, there can be no justification for refusing to redress similarly willful activity which violates not merely the law of torts, but the non-discrimination provisions of the Constitution itself.

The government's lame attempt to distinguish Wilkes v. Dinsman is singularly unpersuasive. First, the government argues, Wilkes involved a tort, not a constitutional claim. Of course, such an observation merely strengthens Wilkes,

since vindication of constitutional rights would seem more compelling than enforcing a tort remedy. Second, the government argues, the military was smaller when Wilkes was decided and fewer internal remedies existed. The need for constitutional enforcement mechanisms would, however, seem directly proportionate to the size of the military establishment. Thus, far from arguing for the abolition of Wilkes v. Dinsman, the size and power of the current American military establishment argues for its retention. Moreover, as this Court noted in Carlson v. Green, the existence of alternative remedies are relevant to a Bivens analysis, but only if they are of equivalent scope. Not even the Solicitor General argues that internal military remedies are the equivalent of an Article III action for damages. Finally, the government argues that while the Wilkes Court recognized

an "ancient common law" remedy, the Ninth Circuit created a "new" remedy. Such an argument misperceives the Ninth Circuit's decision. Surely, there is nothing new about the principle that racial discrimination is forbidden by the Constitution. Nor is there anything new about using compensatory damages to right legal wrongs. The Ninth Circuit merely applied traditional remedies to traditional legal principles. If there is anything new in this case, it is the Solicitor General's determined attempt to place the military above the constitutional law of the land.

II. MILITARY OFFICIALS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY FROM DAMAGE ACTIONS BY SUBORDINATES FOR THE WILLFUL VIOLATION OF CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

With the sole exception of the President of the United States, this Court has consistently refused to grant execu-

tive officials absolute immunity from damage actions for the violation of clearly established constitutional rights. Compare Nixon v. Fitzgerald, __U.S.__, 73 L.Ed.2d 349 (1982) (describing unique status of President) with, e.g. Harlow v. Fitzgerald, 73 L.Ed. 396 (1982)(denying blanket absolute immunity to White House aides); Scheuer v. Rhodes, 416 U.S. 232 (1974)(Governor, National Guard officials); Butz v. Economou, 438 U.S. 478 (1978)(cabinet officials); Procunier v. Martinez, 416 U.S. 396, 406 (1974)(prison officials); Pierson v. Ray, 386 U.S. 547 (1967)(police officers); Wood v. Strickland, 420 U.S. 308 (1975)(educational officials); Davis v. Passman, 442 U.S. 228 (1979)(members of Congress as employers). "For executive officials ... qualified immunity presents the norm." Harlow v. Fitzgerald, 73 L.

Ed.2d 396, 403 (1982).[17] Petitioners seek a dramatic and potentially dangerous exception from the norm on behalf of military officials in seeking to "bear the burden of showing that public policy requires ... absolute exemption from personal liability for [their] unconstitutional conduct" towards their subordinates. See Butz v. Economou, 438 U.S. 479, 506 (1978).[18]

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17. As defined in Harlow, a qualified immunity shields an individual defendant from liability so long as a reasonable person would not have been expected to know that his conduct violated constitutional norms.

18. In Butz (438 U.S. at 489-91), the Court explained that the grant of absolute immunity to certain executive officials in Barr v. Matteo, 360 U.S. 564 (1959), was not intended to insulate an official who acted beyond a "constitutional limitation on his authority". 438 U.S. at 489. Compare Feres v. United States, discussed supra at pp. 22-28 with Barr v. Matteo, supra. Thus, while military officials may well enjoy an absolute immunity in certain tort cases, no similar immunity exists in a constitutional case. Barr was applied to a military commandant in Howard v. Lyons, 360 U.S. 593, 597 (1959).

Casting petitioners' argument in terms of this Court's immunity decisions, petitioners contend that a military superior's potential liability in damages for the willful violation of an established constitutional right would cause him to hesitate in the issuance of valid orders; and that such hesitation would be more detrimental to the public than hesitation by other officials because of the military's function (see Pet. Br. 21-25).[19] In addition, petitioner argues that the existence of a damage remedy for willful violations of the Constitution would impede the existence of a relationship of trust and discipline necessary to the maintenance of an effective fighting force. However, whether one approaches the issue from the perspective of history, public policy, ana-

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19. The military function at issue in this appeal excludes activity in a "combat setting." (Pet. App. 16a, n.10).

lagous precedent or functional analysis, no basis exists for granting absolute immunity to the military establishment for the willful violation of a serviceman's constitutional rights.

A. History Rejects The Grant Of Absolute Immunity To Military Superiors For Willfully Unlawful Acts.

In Wilkes v. Dinsman, 48 U.S. (7 How.) 83 (1849), on writ of error after a new trial, 53 U.S. (12 How.) 390 (1851), the Supreme Court sustained the validity of a complaint for damages filed by an American sailor alleging that he had been unlawfully flogged by his superior officer while on the high seas.[20] The recognition in Wilkes

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20. Although the complaint in Wilkes v. Dinsman was couched as a common law tort, it is apparent that, were it filed today, it would make out a claim under the Eighth Amendment as well. See Carlson v. Green, supra. The Court declined to dismiss the complaint in Wilkes despite the acquittal of Captain Wilkes by a court martial.

v. Dinsman that military superiors who willfully[21] exceed the limits of their lawful authority may not plead official immunity is fully consistent with the classic evolution of executive immunity in related contexts involving law enforcement officials. See, e.g. Scheuer v. Rhodes, supra; Pierson v. Ray, supra. Moreover, Wilkes was not an isolated phenomenon. Thus, in Luther v. Borden, 48 U.S. (7 How.) 1, 61 (1848), this Court noted that military authority:

> cannot, without liability to a private suit in the judicial tribunals, be exercised on a soldier himself for a cause not military or over which the officer has no right to order him. (emphasis added)(citing both English and American Precedents).

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21. Chief Justice Taney ruled that Dinsman could recover if Wilkes had acted from "malice or a vindictive feeling". 53 U.S. at 404. See also 48 U.S. (7 How.) 88, 122 (1849). Phrased in modern terms, Captain Wilkes enjoyed only a qualified immunity for good faith acts.

Similarly, in Bates v. Clark, 95 U.S. 204, 209 (1877), a military officer was deemed liable in damages despite a defense that he was merely acting in accordance with a superior's orders. Finally, in Mitchell v. Harmony, 54 U.S. (13 How.) 113, 134-35 (1851), a military official was deemed personally liable for an unjustified seizure of property during deployment against the enemy in enemy territory, unless he had "reasonable grounds for believing that the peril is immediate." See also Little v. Barreme, 2 Cr. 170 (1804). Thus, as the Ninth Circuit noted below, no historical precedent exists to support a claim for absolute immunity for military officials.

B. Public Policy And Analagous Recent Precedent Reject The Grant Of Absolute Immunity To Military Officials.

1. The Effect of Qualified Immunity on the Issuance of Military Orders

Petitioners argue that continued recognition of the historic existence of a qualified, as opposed to an absolute, immunity for military officials would unduly inhibit the issuance of necessary military orders. However, from the standpoint of inhibiting the issuance of valid orders, the question of immunity for officials with sensitive public safety functions was resolved by Scheuer v. Rhodes, 416 U.S. 232 (1974). In Scheuer the Governor, Adjutant General of the National Guard, and other National Guard officers, were accorded only a qualified immunity from liability for injuries suffered when guardsmen were deployed and ordered to fire their guns during an alleged

civil disturbance. The Court pointed out: "In common with police officers ... officials must often act swiftly and firmly ... when a condition of civil disorder in fact exists, there is obvious need for prompt action" with regard to "the decision to invoke military power." (416 U.S. at 246).[22]

If orders issued by the Governor and the National Guard during a civil disturbance are entitled to merely a qualified immunity, it is difficult to understand why military orders issued in peacetime and in a non-combat setting should be accorded the drastic protection of absolute immunity. In short, Scheuer is the modern analogue of Wilkes v. Dinsman and is dispositive of the immunity issue in this case.

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22. And see Gilligan v. Morgan, 413 U.S. 1, 11 (1973) as to the National Guard's possible "accountability in a judicial forum ... by way of damages ... ".

As to other instances of qualified immunity in spite of circumstances in which quick and firm orders are necessary for the public safety, see Imbler v. Pachtman, 424 U.S. 409, 430 (1976), and Butz, supra, 438 U.S. at 501 (policemen);[23] Carlson v. Green, 446 U.S. 14, 19 (1980) (prison officials): "even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the ... qualified immunity .... provides adequate protection "; Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials).

2. The Burden of Defending in a Qualified Immunity Setting

Petitioners contend, as well, that the burden of defending unwarranted constitutional claims argues strongly for the creation of an absolute immunity for

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23. In civil disorders, the Armed Forces performed the same functions as the police. See Laird v. Tatum, 408 U.S. 1, 5 (1972).

military officials. However, respondents' recognition that internal military remedies must be exhausted and the exclusion of "combat settings" from the decision below, eliminates the "burden" issue as a serious factor. There is no reason to believe that the time pressures on military officials in peacetime are more onerous than those borne by other government officials, such as prison officials and policemen who have been denied absolute immunity by this Court.[24] In addition, the newly reinforced summary judgment procedure on the existence of a qualified immunity defense will expedite the determination of insubstantial

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24. Under current guidelines, the government bears the burden of defending Bivens actions against individual government defendants, including members of the military.

cases.[25] See Harlow, supra, 73 L.Ed.2d at 396 , Pet. App. 17a.

In petitioners' fear of the number of unwarranted suits that might ensue from the ruling of the court below (Pet. Br. 23-24), they overlook the significant restraint on litigation imposed by the nature of military life and the impossibility of leaving it at will. The antagonism likely to be engendered towards the serviceman who files suit against his superior and the many ways in which it can be manifested in the enclave of a vessel or base acts as a potent deterrent to frivolous litigation. (See JA 26-39):

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25. Cf. Alvarez v. Wilson, 431 F. Supp. 136, 145 (N.D. Ill. 1977) App. pending, No 81-2696 (7th Cir.): affidavits fail to establish good faith of administrator and psychiatric evaluation of a "Black-Puerto Rican" assertive member of the base's human relations committee, who was released by hospital psychiatrists with a report of no psychiatric disability.

alleged harassment and racial slurs towards plaintiff-respondents). Further, the "lack of time and money" to retain an attorney and pay other litigation costs (see Feres, supra, 340 U.S. at 145) is another realistic impediment.

3. The Effect of Qualified Immunity on a Serviceman's Obedience to Orders and the Morale and Trust of the Armed Forces.

Petitioners suggest that a refusal to cloak military supericrs with absolute immunity would encourage disobedience to orders. U.S.C.M.J. Art. 90; 10 U.S.C. § 890. The fact that the unlawfulness of an order is a recognized defense to a court martial proceeding has not impaired military discipline. Indeed, it has acted as a necessary restraint which reinforces the effectiveness of our military forces.[26]

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26. The effort to increase the sense of justice and fair treatment in the military has stimulated dramatic reform of
(footnote continued on following page)

Similarly, recognition that military superiors are not above the Constitution can only serve to strengthen the effectiveness and will of a free people's defense forces. Indeed, it is difficult to understand how immunizing military officials from damages for willful racial discrimination would aid the sense of mutual trust and confidence which is a prerequisite of any effective fighting force.[27]

(footnote continued from preceding page) the court martial procedure over a fifty year period. See Schleuter, The Court Martial, 89 Mil. L. Rev. 129, 156, 165 (1980).

27. Only a qualified immunity for acts performed in good faith was accorded a congressman in a suit by his employee for an unconstitutionally discriminatory discharge, despite the special relationship of confidence and loyalty between a congressman and his employee. Davis v. Passman, 442 U.S. at 249 (Burger, C.J., dissenting).

Lingering vestiges of racism weaken us as a nation -- and weaken our armed forces as its shield. Elimination of the only judicial remedy available to a serviceman who is the victim of willful racial discrimination hardly serves to improve the morale and trust within the military. See Alvarez v. Wilson, 431 F. Supp. 136, app. pending, No. 81-2696 (7th Cir.).

Moreover, in view of the immediate consequences for disobedience to an order that can be imposed under the Uniform Code of Military Justice, the distant possibility of a lawsuit against a superior could not have an appreciable effect of military discipline.

Disobedience of a superior's order, punishable by death in wartime, is punishable by any punishment a court martial directs, except death, in peacetime; (10 U.S.C. § 890) also punishable are "all

disorders and neglects to the prejudice of good order and discipline in the armed forces." (10 U.S.C. § 934).[28] The code specifies no limit on the allowable period of a suspect serviceman's confinement after arrest, either before arraignment or before trial, nor does it provide for bail; during confinement the prisoner can be segregated and subject to "minor pun-

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28. See Parker v. Levy, 417 U.S. 733 (1974) upholding constitutionality of § 934. Levy was sentenced to 3 years confinement at hard labor and other penalties (417 U.S. at 736) for violation of the above-quoted sections and the section prohibiting conduct unbecoming an officer and a gentleman.

Assuming arguendo that discipline might be affected by the possibility of a damage suit, the exclusion of orders in a "combat setting" from the ruling below (Pet. App. 16a, n.10) implements the greater significance attributed to wartime than to peacetime obedience to orders in 10 U.S.C. 890.

ishment" for infractions of discipline; a serviceman attached to a vessel is subject, at a commanding officer's discretion, to non-judicial punishment (without the option of court martial), which can include seven days confinement (10 U.S.C. §§ 807, 809, 810, 813, 815, 833).

In the context of the compulsion towards obedience exerted by the military justice system, it is clear why the Court in Dinsman, supra, treated as entirely consistent its emphasis on the serviceman's obligation to obey all orders (see 53 U.S. at 403-404) and his superior's qualified liability to him for damages.[29] See Bates v. Clark, 95

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29. Civilians receiving police directions on the streets or highways are accustomed to the reaction that yielding even to an invalid order will be less burdensome than courting arrest and litigation by disobedience; for a serviceman the results of an arrest for insubordination are much more fearsome.

U.S. 204, 209 (1877) where an officer was held liable for damages regardless of his claim that he issued his order in accordance with his duty to obey superior orders; and Little v. Barreme, supra.

The need in a prison for the prisoners' obedience to orders and conformity with regulations is analagous to that need in the Armed Forces. Nevertheless, the Court believes that only qualified immunity for prison officials from damages suits by inmates is required. See Procunier v. Martinez 416 U.S. 396, 406 (1974) referring to the "tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights"; Procunier v. Navarette, 434 U.S. 555 (1978); Carlson v. Green, 446 U.S. 14 (1980).

4. Qualified Immunity and the Function of a Military Superior

This Court has consistently refused to extend an absolute immunity to an official whose function did not require it. E.g. Butz v. Economou, 438 U.S. at 506, 515; Imbler v. Pachtman, 424 U.S. 490, 430 (1976), Doe v. McMillan, 412 U.S. 306, 317, 319, 320 (1973); Stump v. Sparkman, 435 U.S. 349 (1978). The Ninth Circuit below recognized that the function performed by a military commander in a combat setting might well require an absolute immunity from damage claims. However given the myriad functions performed by our peacetime military establishment in a non-combat setting, a grant of blanket absolute immunity to all military supervisors has never been the law.

See, e.g. Henderson v. Bluemink, 511 F.2d 399, 403-404 (D.C. Cir. 1974) (army doctor). The military has "become a multi-million person employer involved in almost every aspect of American life." See Zilman and Imwikelreid, Constitutional Rights and Military Necessity, 50 Notre Dame Law.396, 400 (1976); see also Comment, Free Speech in the Military, 53 N.Y.U. L.Rev. 1102, 1114 (1978).[30] Indeed, members of the armed forces, including many who perform duties identical to those ordinarily performed by civilians, are subject to military orders about their conduct even in their own homes in the civilian community. See Schlesinger v. Councilman, 420 U.S. 739 (1975).

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30. As to the variety of duties performed by the military, see, e.g. 10 U.S.C. § 41 (appointment of officers to Military Staff Committee of the United Nations); 10 U.S.C. § 719 (members of Armed Forces detailed for duty in Department of Commerce); 10 U.S.C. § 2114 (medical students supported by Defense Department appointed as officers); 10 U.S.C. § 713 (members of Armed Forces to inspect State Department buildings).

No basis exists for suggesting that the vast bulk of military officials perform functions which require the extraordinary shield of absolute immunity. To suggest that a Motor Pool Sergeant or a Mess Officer is called upon to perform functions comparable to those performed by the President of the United States or a sitting judge is ludicrous. In the vast bulk of settings, a grant of qualified immunity fully satisfies any legitimate concern for military efficiency and function.

Moreover, unlike the President and sitting judges, who have been afforded absolute immunity, no effective alternative mechanism operates to assure compliance with constitutional norms in a military setting. By definition, military society is often geographically, psychologically, and physically remote from civilian life. The safeguards of

public scrutiny and formal review which may be counted upon to assure compliance with constitutional norms in many areas of civilian life are simply not present in many -- perhaps most -- military settings.

The grant of absolute immunity to military officials would affect literally millions of individuals. Unlike a narrow grant of absolute immunity to a discrete category of officials based upon a careful functional analysis, a blanket grant of immunity to all military officials would create an enormous loophole in the Constitution, justified by neither history, policy nor functional analysis.

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: February 2, 1983

IN THE

Supreme Court of the United States

October Term, 2008

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

WILLIE WALLACE, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BILL OF RIGHTS FOUNDATION, INC.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-167

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE
of
THE BILL OF RIGHTS FOUNDATION, INC.

INTEREST OF AMICUS

The Bill of Rights Foundation, Inc. is an organization concerned exclusively

with the protection of constitutional rights.* It has done this work for more than a decade by supporting litigation in that area either directly or by filing briefs amicus curiae. The Foundation believes that the instant case presents such issues.

THE NATURE OF THE CASE

This case rests on one of the three constitutional protections essential to a free society: freedom of speech, due process and equal protection. The complaint, by six black enlisted men on a

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* Written consents to the filing of this brief amicus curiae have been granted by all parties and have been lodged with the Court.

naval vessel, alleges various acts claimed to have been motivated by racial discrimination and seeks damages from the individuals responsible. The claims were assignments to the least desirable occupations, exclusions from training programs, giving low evaluations and unusually severe punishment. In one instance one of the men complained that he had been subjected to the indignity of being ordered to clean a stove with a toothbrush.

The Court of Appeals in Wallace v. Chappell, 661 F.2d 729 (1981), held the complaint sufficient subject to the consideration by the District Court of the following four criteria: (1) the nature and strength of the plaintiff's claim; (2) the potential injury to the plaintiff if review is refused; (3) the extent of

interference with military functions; (4) the extent to which military discretion or expertise is involved. Petitioners have brought the case to this Court without waiting for action by the District Court in conformity with these criteria.

It will be noted that the Court of Appeals has not held that a serviceman may sue his superior for alleged violation of a constitutional right regardless of applicable considerations and that petitioners are asking this Court to rule that such a suit can never be maintained. We submit that there is nothing in the previous decisions by this Court or in the applicable policy considerations that compels so drastic a result.

ARGUMENT

There is no basis for the statement in petitioners' brief (p. 4) that every other Court of Appeals has "refused to allow a serviceman to sue his superior officer for damages for a constitutional violation." Not one of the cases cited (pp. 14, 15) involves a constitutional issue of the magnitude here presented. Indeed, no constitutional issue whatever was raised in most of the cases. All of them sought damages for injuries or death resulting from claimed negligence or malpractice, progeny of this Court's decision in Feres v. United States, 340 U.S. 135 (1950). In those cases in which an attempt was made to translate the tort into a constitutional violation the courts described this as mere verbal maneuvering. The courts

also stressed the fact that Congress has assured servicemen some form of compensation. No such congressional provision exists with regard to the harm claimed here. Indeed, in one of the cited cases the court noted that there might be situations in which the violation of a constitutional right would permit a suit for damages: Calhoun v. United States, 475 F. Supp. 1, 5 (1977). Surely this is such a case. Moreover, in Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978), the Eighth Circuit, while denying relief in the particular case, held that military officers, at least during peacetime, were not entitled to absolute immunity. 585 F.2d at 914. Summary judgment was therefore held inappropriate insofar as it rested on absolute immunity.

We come then to the merits of the arguments made by petitioners. We pass over their discussion of most of this Court's prior decisions (pp. 15-19) as that discussion and the cases considered really have nothing to do with the issue in this case. The various references in petitioner's brief (pp. 22, 36, 37) to Harlow v. Fitzgerald, now reported at 102 S. Ct. 2727 (1982), miss the real point of the decision. This Court there held that assistants to the President were not entitled to absolute immunity but only to qualified immunity. Justice Powell pointed out that this existed when the conduct of the individual "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 102 S. Ct. at 2738. Where the conduct

does violate such rights an action for damages lies. In the case at bar the violation claimed is of a constitutional right of which defendants must certainly have been aware -- the right to be free from racially motivated discrimination. The case is therefore authority for the position here taken by the Court of Appeals.

1. Petitioners' chief argument is that of disruption of military discipline (pp. 20-26). They have not given real consideration to the fact that the Court of Appeals required the District Court, before allowing the case to proceed, to determine "the extent of interference with military functions." 661 F.2d at 733. The various quotations from decisions of this Court were in contexts wholly different from the pre-

sent one.

The stress on the threat of "massive personal liability" (p. 2) states the real issue: which is more important -- the eradication of racial discrimination or the protection of those responsible? The question answers itself. And since the only way in which the sufferers of the indignity of racial discrimination can be protected is by money damages, a suit such as this should be maintainable. Indeed it may well be that the threat of money damages will help eradicate such discrimination more quickly than anything else. It may even be necessary to accomplish the needed result. In passing, it should be noted that petitioners have been spared the financial burden of defending; that has been assumed by the government.

2. Petitioners next argue (pp. 26-30) that the courts will be "intruding into military affairs." That misstates the issue. This case requires the courts to consider only one basic issue: were the challenged actions motivated by racial discrimination. In that area the courts have great expertise -- from the implementation of Brown v. Board of Education, 347 U.S. 483 (1954) to the interpretation of the Civil Rights Acts of 1957 and 1964 (42 U.S.C. § 1971, et seq.), as well as the Voting Rights Act of 1965, (42 U.S.C. § 1971, 1973, et seq.). Indeed, there is hardly any other subject in the civil law area with which the courts have been more frequently concerned -- as, in the criminal law area it has been the Fourth Amendment.

Petitioners seem to suggest (p. 27, n. 4) that any administrative decision reached here would be final. But Congress has not so decreed. Nor has Congress provided any remedy for compensating the affronted servicemen.

Petitioners (pp. 28, 29) talk about possible interference with military discipline. But the issue here is not whether, in the ordinary sense, the actions taken were proper, but whether they were improperly motivated.

The discussion (p. 30) of the criteria held applicable by the Court of Appeals (which we have quoted above) simply rejects the idea that a civilian court can ever pass on military matters. For so sweeping a statement no authority is cited. And such doctrine would

portend the end of constitutional government.

3. Petitioners next discuss (pp. 31-35) the tensions which might result if suits like the instant one were allowed. But nothing is here added to what they argued elsewhere. The references to remedies provided by Congress ignore the fact that Congress has made no provision to compensate persons like respondents here.

4. Finally, petitioners claim (pp. 35-39) that they should have absolute immunity. But there is nothing in the functions performed by any of these persons to entitle them to the immunity granted judges and prosecutors. The subject was carefully considered in Alvarez v. Wilson, 431 F. Supp. 136, 144

(N.D. Ill. 1977), app. pending, No. 81-2696 (7th Cir.) and also by the court below, 661 F.2d at 735, et seq. It concluded that petitioners were entitled to qualified immunity if they acted in good faith. In a sense there really is no such question here. For if any of petitioners acted, as here charged, to deprive any of respondents of their right to equal treatment because of their race, they could not have acted in good faith.

5. It is pertinent to discuss at some length the Dinsman cases cited by the Court of Appeals, 661 F.2d 732, 735, n. 8; Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849); Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851). Dinsman, who had enlisted in the Navy, sued his superior, Capt. Wilkes, for damages claiming that

he had been unlawfully treated while his ship was on an expedition in the Sandwich Islands. In the first trial plaintiff recovered. This Court reversed and ordered a new trial because defendant had been required to justify his actions. At the second trial, defendant was successful. Again this Court ordered a new trial because of errors committed. We are not told what happened afterwards.

The records of the cases are hard reading because the contentions of the parties are set forth in full in their ancient form of bills of exceptions. But the holdings are clear, namely, that a commanding officer may be liable to a subordinate for damages if he acts with malice. In the first case Justice Woodbury rejected plaintiff's claim that he was no longer subject to discipline

but ruled that defendant would not be liable if his acts were "not influenced by malice, corruption or cruelty." (p. 129) He further said that no exception should be allowed "under color of his office however elevated or however humble the victim." (p. 130) In the second case Chief Justice Taney said that the nation would be dishonored if it "allowed the humblest individual in its service to be oppressed or injured by his commanding officer from malice or ill-will." (p. 403)

Petitioners attempt to distinguish these cases (p. 39) on two grounds: that the wrong complained of did not arise under the Constitution; and that at the time of the decisions our armed forces were small. The first point is without logical basis since there is no

reason to suppose that a constitutional right has any less validity than a common law one; the second point is shocking -- rights cannot be diminished because they affect large numbers of people.

In sum, these two opinions stand as authority for the position taken by the Court of Appeals and should be followed today by this Court.[1/]

CONCLUSION

So we come back to the opinion of the Court of Appeals -- 661 F.2d 729 -- which carefully considered all the issues. It based jurisdiction on Bivens v. Six Unknown Named Agents, 403 U.S.

1/ The first of these cases was recently cited by this Court in Butz v. Economou, 438 U.S. 478, 492 (1978).

388, n. 1 at p. 370 (1971). The Court considered at length, 661 F.2d at 731-734, the extent to which actions by military officers could be challenged in civil courts and concluded that the criteria formulated in Mindes v. Seaman, 453 F.2d 197 (1971), were applicable. These we have quoted above. The Court then limited their application to what could be considered as "recognized" constitutional right. That the claims here asserted, denial of equal protection, come within that description and cannot be denied.

Finally, the Court of Appeals took up the question of the available remedy -- under the heading of "Immunity", 661 F.2d at 734-737. The Court based its conclusion that this action was maintainable (under the conditions previously

laid down) primarily because no other form of relief could compensate respondents for the indignities they claim to have suffered.

The conclusions of the Court of Appeals should be accepted here and its order affirmed.

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Dated: February 23, 1983

Office-Supreme Court, U.S.
FILED
FEB 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-167

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMICUS CURIAE

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BRIEF FOR THE AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law is a national organization that was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure civil rights to all Americans. The potential impact of this case on the civil rights of all minority members of the armed forces has prompted the Lawyers' Committee to file this brief *amicus curiae*, in support of the respondents and urging affirmance of the judgment below. Both petitioners and respondents have consented to the filing of this brief.

SUMMARY OF ARGUMENT

A. Respondents have a cause of action against petitioners under the fifth amendment and the Civil Rights Act, 42 U.S.C. § 1985(3). This Court's holdings in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and its progeny recognize a strong presumption in favor of an implied cause of action under the Constitution. The pending controversy meets all the tests set forth by this Court for the recognition of an implied right of action: no adequate alternative remedy is available to compensate respondents for their injuries, there is no explicit "congressional declaration" that a damage action is inappropriate, and no "special factors counseling hesitation" are present. *Bivens*, 403 U.S. at 396. Because this case involves an explicit statutory cause of action as well as an implied constitutional claim, this Court must in any event determine the proper scope of official immunity. In the circumstances of this case, the immunity test, like the *Bivens* analysis, must focus on whether the recognition of a damage action to redress violations of constitutional rights would unduly impair overall military effectiveness.

B. The court of appeals properly relied on *Butz* v. *Economou*, 438 U.S. 478 (1978), and the established rule of law that qualified immunity is appropriate for government officials charged with constitutional violations. The daily life of service personnel in peacetime does not qualify as an exceptional circumstance justifying absolute immunity.

This Court has previously allowed intramilitary suits for intentional torts, *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 (1852), and *Feres* v. *United States*, 340 U.S. 135 (1950). Indeed, the Court in *Feres* carefully distinguished the earlier intentional tort cases. Thus, this Court's prior cases demonstrate that except in the most exceptional and

limited circumstances, government and military officers are entitled only to qualified immunity in cases of constitutional violations.

C. This Court has long recognized the specialized and fundamental commitment of this nation to ferret out racial discrimination, root and branch, wherever it may be found. In the present case, this national policy can fairly be balanced against the need to preserve military effectiveness by allowing service personnel whose constitutional rights are violated to bring damage actions, while granting superior officers a qualified immunity. Petitioners have been unable to show that damage actions will impair military effectiveness. Moreover, damage actions will serve to eliminate arbitrary and racially motivated conduct within the military, and thereby increase morale and ultimately the effectiveness of the armed forces.

ARGUMENT

I.

Introduction

This case presents an important question of constitutional law, which is whether the millions of Americans who have served, are serving, and will serve in the armed forces of this nation are entitled to be made whole for violations of their constitutional rights. This Court must decide whether military officers who knowingly subject enlisted personnel to racial discrimination may be held accountable, in a meaningful way, for their unconstitutional acts.

The court of appeals held that respondents had both an implied right of action under the Constitution for violations of their fifth amendment rights and an explicit right of action under 42 U.S.C. § 1985(3). (Pet. App. 2a.)[1] The court of appeals also rejected petitioners' claimed entitlement to absolute immunity, but held that they were entitled to a qualified immunity. (Pet. App. 16a). The decision of the court of appeals is in accord with the previous decisions of this Court, and it strikes a fair balance between the important national policy of eliminating racial discrimination and the legitimate concerns of military discipline.

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[1] The opinion of the court of appeals is reprinted in the appendix to the petition for a writ of certiorari and will be referred to herein as "Pet. App." Petitioners' Brief will be referred to herein as "Pet. Br."

II.

Respondents Have An Implied Cause Of Action Under The Fifth Amendment.

The respondents' complaint alleges a cause of action against the petitioners under the fifth amendment and also under the conspiracy provisions of the Civil Rights Act, 42 U.S.C. § 1985(3). The court of appeals decided as a threshold matter that respondents had an implied *Bivens*-type action under the fifth amendment. (Pet. App. 2a.) The balance of the court's opinion analyzed the question whether petitioners were entitled to absolute immunity from suits charging constitutional violations or were entitled to a qualified immunity only. In this Court, however, petitioners apparently do not question the holding that they are not absolutely immune from suit, contending instead that a cause of action should not be implied under the fifth amendment when a member of the armed forces sues his commanding officers.

The Court should decide this case on the same basis as did the court of appeals. Although the court of appeals did decide as an initial matter that respondents had an implied cause of action under the Constitution, this Court lacks the benefit of any extensive analysis on the *Bivens* issue by either the court of appeals or the district court. Moreover, even accepting petitioners' argument that these respondents do not have a direct cause of action under the Constitution, that determination does not dispose of the issues raised by the opinion of the court of appeals. Respondents have also alleged a cause of action under 42 U.S.C. § 1985(3),[2] and unless the Court addresses

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[2] Section 1985(3) prohibits "all private conspiracies" motivated by racial animus to deprive black people of the equal protection of the laws. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). It is not

(footnote continued)

the immunity issue as well, those claims will remain. Finally, the considerations of military discipline relied upon by petitioners are more properly considered in terms of whether an absolute or qualified immunity is appropriate.

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court recognized an implied cause of action for damages arising directly under the Constitution for alleged violations of fourth amendment rights by federal officials. Quoting from *Marbury* v. *Madison*, 1 U.S. 267, 1 Cranch 137 (1803), this Court noted that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Bivens*, 403 U.S. at 397.

In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court extended the cause of action recognized in *Bivens* to encompass alleged violations of the equal protection component of the fifth amendment. The Court held that the plaintiff stated a cause of action for sex discrimination against her former employer, a congressman, despite the fact that Congress had specifically exempted itself from coverage under Title VII of the 1964 Civil Rights Act. *Davis*, 442 U.S. at 247; 42 U.S.C. § 2000e-16. In *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court recognized an implied cause of

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(footnote continued)

limited, as is 42 U.S.C. § 1983, to acts performed "under the color of state law." *Griffin*, 403 U.S. at 101-02. Moreover, the courts have generally applied Section 1985(3) to conspiracies perpetrated by federal officials. *See, e.g., Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926, 930-31 (10th Cir. 1975); *Peck* v. *United States*, 470 F. Supp. 1003, 1008-12 (S.D.N.Y. 1979); *Alvarez* v. *Wilson*, 431 F. Supp. 136, 141 (N.D. Ill. 1977), *appeal filed*, No. 81-2696 (7th Cir. Oct. 13, 1981) (former Navy lieutenant had cause of action under section 1985(3) against his superior officers for race discrimination).

action for damages for alleged violations of the eighth amendment, despite the fact that Congress had provided an alternative remedy under the Federal Tort Claims Act.

Like the plaintiff in *Davis*, respondents here have attempted to state a cause of action under the equal protection component of the fifth amendment. Petitioners do not dispute the existence of an implied cause of action under the fifth amendment, but instead attempt to exempt a particular group of claimants, that is, members of the military who allege that their constitutional rights have been violated by their superiors.

Petitioners argue that this Court should not recognize a cause of action directly under the fifth amendment for these individuals because the Court should not provide additional remedies in the military context absent express congressional authorization. (Pet. Br. at 13-14.) In *Bivens*, however, the Court squarely rejected the argument that it could not recognize a remedy absent express congressional authorization. 403 U.S. at 402 (Harlan, J., concurring). Indeed, *Bivens* and its progeny have held that the only situation in which the Court might not recognize an implied cause of action is when Congress has provided an adequate substitute for the damages remedy. *Bivens*, 403 U.S. at 397; *Davis*, 442 U.S. at 248. Petitioners are unable to point to any congressional provision for a substitute remedy.

Indeed, in *Carlson* v. *Green*, 446 U.S. 14 (1980), this Court held that an implied cause of action was available to the plaintiff under the eighth amendment, despite the fact that she also had a remedy under the Federal Tort Claims Act ("FTCA"). The Court analyzed the sufficiency of the FTCA remedy, finding that it did not afford the plaintiff the opportunity for punitive damages, a jury trial, or

the imposition of personal liability against the responsible official. Because the remedy provided by the FTCA was not as effective, the Court concluded, the *Bivens* remedy also was available. *Id.* at 20-23.

In most instances, enlisted personnel who suffer racial discrimination at the hands of their superiors will not have any effective remedies available within the military, nor will the nature of their injuries be subject to redress through declaratory or injunctive relief. For these people, as Justice Harlan noted in *Bivens*, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

Although petitioners suggest that alternative remedies are available to these respondents within the military services (Pet. Br. at 32-35), those alleged remedies are wholly inadequate: they are narrowly drawn, they do not provide compensatory relief, they do not specifically address the problem of racial discrimination, and they rely on another party to prosecute the complaint.[3] Petitioners

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[3] Petitioners apparently suggest that respondents could obtain adequate relief before the Board for the Corrections of Naval Records under 10 U.S.C. § 1552. However, section 1552 is a very narrow provision allowing members of the armed forces to correct errors in service records and to collect back pay that may have been lost because of such errors. This provision does not authorize the board to review the *constitutionality* of activities undertaken by military officials. *Glines* v. *Wade*, 586 F.2d 675, 678 (9th Cir. 1978), *rev'd on other grounds sub nom. Brown* v. *Glines*, 444 U.S. 348 (1980).

The two other alternative mechanisms, court martial for violation of the prohibitions of 10 U.S.C. §§ 892, 893, 933, and 934 and the grievance procedure of 10 U.S.C. § 938, are also inadequate. Both require the complainant to rely on another party to prosecute the matter, and neither provides any form of compensatory relief to the victims. Moreover, the prohibitions of sections 892, 893, 933, and 934 are simply generalized statements of conduct which do not specifically prohibit racial discrimination.

are unable to point to any congressional provision for an adequate substitute remedy for these respondents, or to any congressional declaration that a damage remedy would be inappropriate. Indeed, petitioners can point to nothing but silence from Congress on this issue. *See Turpin* v. *Mailet*, 579 F.2d 152, 163 (2d Cir.) (en banc) ("[n]othing . . . suggests that legislative silence can in any way be viewed as an expression of congressional 'intent,' let alone the sort of 'explicit congressional declaration' required by *Bivens*"), *vacated and remanded mem. sub nom. City of West Haven* v. *Turpin*, 439 U.S. 974 (1978); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 358 (2d ed. 1973) (courts should not lightly infer congressional efforts to preclude relief for constitutional violations).

Petitioners also argue that in the military context there are "special factors counseling hesitation" in recognizing an implied cause of action. *Bivens*, 403 U.S. at 396. (Pet. Br. at 13.) *Bivens*, however, enumerated only two such special factors, one involving questions of federal fiscal policy and the second involving situations in which the conduct complained of was not unconstitutional, but merely ultra vires. *Bivens*, 403 U.S. at 396-97.

Yet, petitioners contend that the "peculiar relationship" between a military officer and an enlisted man is a special factor that precludes the recognition of an implied cause of action. Petitioners argue that this nation's military effectiveness would be imperiled if intramilitary damage suits were allowed, presumably because such suits would impair the discipline underlying the relationship between officers and enlisted personnel. That relationship, however, is simply not the kind of special factor that

justifies ignoring the fundamental constitutional proscription against racial discrimination.

In *Davis* v. *Passman*, 442 U.S. 228 (1979), this Court examined the relationship between a congressman and his staff, both in view of the independence of the legislative branch, *id.* at 235 n.11, and the special protection provided for congressmen under the speech and debate clause of the Constitution. *Id.* at 235, 246. Both of those considerations arise directly from the Constitution and present a stronger case for a "special factor" than does the relationship between officers and enlisted men. Nonetheless, this Court held that those constitutional considerations insufficient to negate an implied right of action.

Moreover, in *Carlson* v. *Green*, 446 U.S. 14, 19 (1980), the Court suggested that even if the constitutional stature of the defendant was such that allowing a damage suit might inhibit his ability to perform his duties, that concern was more properly addressed by a grant of qualified immunity rather than denying the existence of a cause of action.

III.

Petitioners Are Entitled To Qualified Immunity Only.

As we have noted, (see page 5, *supra*) the court of appeals held as a threshold matter that respondents did have a cause of action directly under the fifth amendment. Most of the court's discussion, however, focused on the question whether the petitioners were entitled to an absolute or qualified immunity. The court of appeals considered this Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), and other cases recognizing that a qualified immunity was

appropriate for both state and federal officials charged with violating constitutional and civil rights. (Pet. App. 12a.) The court of appeals also considered two previous decisions of this Court, *Feres* v. *United States*, 340 U.S. 135 (1950), and *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 (1852), which considered claims arising out of military service, and found that neither decision precluded the granting of money damages in circumstances such as those presented here. (Pet. App. 13a.) Finally, the Court considered whether the military context in which these claims arose presented such special circumstances as to warrant absolute immunity, and held that they did not. (Pet. App. 14a-15a.) Noting that absolute immunity from suit would leave "a range of unredressable wrongs bounded only by the limits of one's imagination," the court of appeals held that petitioners were entitled only to a qualified immunity. (Pet. App. 18a-19a.)

A. The Supreme Court Generally Has Recognized Only A Qualified Immunity To Government Officials And Has Extended Absolute Immunity Only In The Most Exceptional Situations.

Our system of government under law "rests on the assumption that all individuals, whatever their position in government, are subject to federal law." *Butz* v. *Economou*, 438 U.S. 478, 506 (1978). In recognition of that principle, this Court has consistently recognized only a qualified immunity for government officials, except in the most exceptional circumstances.

In *Butz*, this Court rejected the petitioners' contention that high level executive officers, including members of the president's cabinet, were entitled to absolute immunity from liability that otherwise might have been incurred in the discharge of their duties. *Id.* at 506-07. As in its other immunity decisions, this Court sought to balance the poten-

tially conflicting interests of individual and government officials. Although it was careful not to "unduly interfere" with the exercise of official responsibilities, *id.* at 507, this Court recognized that government officials, by virtue of their positions might abuse their power and abridge important constitutional rights, to the detriment both of individual citizens and of our fundamental institutions. "In situations of abuse, an action for damages against the official responsible can be an important means of vindicating constitutional guarantees." *Id.* at 506.

Both before and after its decision in *Butz*, this Court has rejected numerous claims of absolute immunity made by various government officials. *See, e.g., Harlow* v. *Fitzgerald*, ... U.S. ....., 102 S. Ct. 2727 (1982) (presidential aides); *Procunier* v. *Navarette*, 434 U.S. 555 (1978) (prison officials); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (state hospital administrator); *Wood* v. *Strickland*, 420 U.S. 308 (1975) (school administrators); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (state governor). These decisions demonstrate that, in all but the most exceptional circumstances, legitimate governmental interests can be preserved when governmental officials charged with violations of constitutional and civil rights are granted a qualified immunity only.

In *Butz*, this Court recognized that absolute immunity for violations of civil rights might be necessary in those few "exceptional situations" in which the defendant had demonstrated that it was necessary for the "conduct of the public business." *Id.* at 507. One such exceptional situation presented itself in *Nixon* v. *Fitzgerald*, ... U.S. ....., 102 S. Ct. 2690 (1982). The Court there granted absolute immunity from liability to the President of the United States, but emphasized the exceptional and "unique" constitutional position of the President as head of the execu-

tive branch. *Id.* at 2702. The companion case of *Harlow* v. *Fitzgerald*, ... U.S. ....., 102 S. Ct. 2727 (1982), however, demonstrated the narrow scope of such "exceptional situations." In *Harlow*, the Court declined to extend the President's absolute immunity to his closest aides and instead held that the aides were entitled to only a qualified immunity.

A military officer can hardly claim the same unique constitutional position as the President of the United States. Moreover, the daily life of service personnel in peace time does not qualify as an exceptional situation. Petitioners are unable to offer any evidence that the myriad mundane tasks performed daily by most enlisted personnel would be disrupted if damage actions for constitutional violations were allowed.

This Court also has held that absolute immunity is necessary for the conduct of the public business by prosecutors and judges. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (judges).[4] This country's adversarial system of justice provides significant protection against arbitrary, unlawful, or abusive conduct by prosecutors and judges. These protections include the existence of an independent and impartial judiciary to curb abusive practices by prosecutors; the professional obligations imposed upon both judges and prosecutors; the right to cross-examine witnesses; and the availability of appellate review. *See Butz* v. *Economou*, 438 U.S. 478, 512-14 (1978).

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[4] Other recent decisions in which defendants were granted absolute immunity were not based upon official immunity, but upon the legislative immunity of the speech and debate clause of the Constitution. *See, e.g., Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 402-06 (1979); *Gravel* v. *United States*, 408 U.S. 606, 613-22 (1972).

The court of appeals examined the policy considerations justifying absolute immunity for prosecutors and judges, but found them lacking in the military setting. (Pet. App. 12a.) The military command structure discourages open dialogue or policies that would otherwise facilitate the alleviation of abuses. Military decisions are generally not reviewable in adversarial proceedings, and the internal grievance procedures which exist are of limited efficacy. (*See* page 8, note 3, *supra.*)

B. Prior Case Law Has Established That Military Officers Are Subject To Damage Suits For Their Intentional Acts.

This Court has already considered the propriety of a damage action against a military officer for an intentional tort in *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849), and in *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 (1852). In both opinions, this Court rejected the defendant's alleged need and entitlement to absolute immunity from suit.

In *Dinsman*, a seaman sued the captain of a United States Navy vessel for assault, battery, and false imprisonment. The seaman claimed that his enlistment had expired during a prolonged voyage and that he was entitled to be discharged. He refused to obey further orders, whereupon the captain arrested and confined him until the ship returned to port.

In reversing a verdict entered in the captain's favor, and remanding for a new trial, the Court made clear that a serviceman is not absolutely immune from suit by a fellow serviceman for a willful tort. While recognizing the problems that civil damage suits could cause, the Court also recognized the unfairness of absolute immunity:

> [T]he nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or illwill, or the wantonness of power, without giving him redress in the courts of justice.

Dinsman v. *Wilkes*, 53 U.S. at 403.

The decision of the court of appeals is consistent with this Court's holding in *Dinsman* that the captain was subject to liability for "willful torts." If military officers are granted a qualified immunity, only intentional or willful acts of discrimination could subject them to liability.

Despite the fact that the FTCA does not apply to violations of constitutional rights,[5] petitioners seek to rely on *Feres* v. *United States*, 340 U.S. 135 (1950), a suit interpreting the FTCA, to support their argument that they are entitled to absolute immunity for violating the respondents' constitutional rights. Pet. Br. at 16-17. *Feres* was a consolidated appeal of three cases in which the plaintiffs sought recovery from the government on behalf of servicemen injured by the negligence of military officers. This Court was required in *Feres* only to construe the statutory provisions of the FTCA to determine whether the federal government was liable for the negligence of a military officer. The *Feres* decision did not examine the issue of official immunity, nor did it examine the scope of immunity for intentional violations of constitutional rights.[6]

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[5] *See United States* v. *Muniz*, 374 U.S. 150 (1963) (prisoners' suit for constitutional violations not precluded by FTCA).

[6] The policy reasons underlying *Feres* do not apply in the pending controversy. As the court of appeals noted below, *Feres*

(footnote continued)

Feres, moreover, carefully distinguished an action for negligence from an action for an intentional tort: "We know of no American law which ever has permitted a soldier to recover for *negligence*, against either his superior officers or the Government he is serving." 340 U.S. at 141 (emphasis added). The Court, however, next cited *Dinsman* and *Weaver* v. *Ward*, Hobart 135, 80 Eng. Rep. 284 (1616), distinguishing the law relating to intentional torts from negligence actions. *Weaver* also permitted an intramilitary action for an intentional tort, assault and battery, by allowing the plaintiff to sue a fellow soldier who had shot him on a skirmish drill.[7]

This Court's prior cases, from *Dinsman* in 1849, to *Harlow* v. *Fitzgerald* in 1982, uniformly support respondents

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(footnote continued)

was a negligence action brought under the FTCA. Because the applicable law varied with the place of the tort, the government would be subjected to widely varying standards. In an action based on violations of the Constitution, however, the same federal law will always apply. *Feres* also found no parallel private liability, as required by the FTCA, and thus held that no recovery could be held against the government. The court of appeals correctly concluded, however, that this reasoning was "entirely inapplicable" to constitutional claims. Finally, the *Feres* Court found that alternative means of compensation were available to the plaintiff, whereas none are available to respondents in this matter. (Pet. App. 15a n.9.)

[7] Indeed, the accuracy of the historical support cited in *Feres* for recognizing absolute immunity against negligence actions has been seriously questioned. A historical analysis of prior cases reveals that even intramilitary negligence actions were proper. *See Jaffee* v. *United States*, 663 F.2d 1226, 1257 n.22 (3d Cir. 1981) (en banc) (Gibbons, J., dissenting), *cert. denied*, 456 U.S. 972 (1982) (citing W. Winthrop, *Military Law and Precedents* 885 (2d ed. 1920)); Zilman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. Rev. 490, 492-502 (1982).

position that they cannot, except in the most extraordinary and limited circumstances, shield themselves from liability. Military and governmental officers must be held liable in damages for wilfull violations of the constitutional and civil rights of their subordinates.

IV.

A Qualified Immunity For Military Officers Strikes A Fair Balance Between The Competing Interests Of The Effective Conduct Of The Military And The Need To Provide Effective Redress For Violations Of Constitutional Rights.

The judgment below allows the interposition of absolute immunity in claims of common law torts, but allows only a qualified immunity in cases of constitutional violations, in all but the most exceptional circumstances. This result strikes a fair balance between the legitimate interests of the military and the competing interest of military servicemen, who are entitled to effective redress for violations of their constitutional rights.

The only compensatory relief reasonably available to respondents is through an action for damages. The decisions examining the propriety of damage actions and the proper scope of immunity require the courts to balance competing interests. *See Nixon* v. *Fitzgerald*, ... U.S. ....., 102 S. Ct. 2690, 2705-06 (1982); *Butz* v. *Economou*, 438 U.S. 478, 506-07 (1978). When other means of redress are not available, the balance of factors will ordinarily favor the granting of only qualified immunity. When some other form of relief is available, however, absolute immunity from suit may reflect the proper balance. *See United States* v. *Muniz*, 374 U.S. 150, 160 (1963); *Feres* v. *States*, 340 U.S. 135, 140 (1950). In the instant case, respondents have allegedly suffered the degradation of racial discrimination and the denial of ordinary opportuni-

ties for advancement and training in the armed forces because of discrimination on the part of officers whom their government has appointed to supervise them during the periods of their military service. Because no alternative compensation scheme is available, dismissal of the pending action would force these respondents to bear the entire weight of their losses with no opportunity to vindicate their rights.

A. The Elimination of Racial Discrimination Is A Paramount National Concern.

To balance fairly the competing interests in this lawsuit, respondents' allegations must be examined in their proper perspective. These allegations are not merely "petty" complaints, as petitioners would characterize them. Pet. Br. at 24. They are serious claims of racial discrimination that must not be taken less seriously merely because respondents happen to be enlisted men rather than, for example, civilian employees of the Department of Defense.

Since 1948, when President Truman ordered the desegregation of the armed forces, Exec. Order No. 9981 (July 26, 1948), the federal government has given substance, in numerous ways, to the principle that this nation is committed by fundamental law to the removal of racial discrimination from our national life. Numerous executive orders, acts of Congress and judicial decisions evidence that fact.

For instance, this Court has recognized that individual claims of discrimination not only benefit the plaintiff but also "vindicate the public interest in preventing . . . [future] discrimination." *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 326 (1980). Likewise, this Court has noted that " 'not merely the power but the duty to render a de-

cree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (employment discrimination), *quoting*, *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965) (voting rights).

Indeed, it is ironic that the government should seek in this case to blunt the most proven and effective weapon against racial discrimination in that very area of national life that was chosen by President Truman to press the fight against discrimination some 35 years ago. In previous cases, this Court has reviewed laws regulating military personnel policies to determine whether they impermissibly discriminated on the basis of sex. *See Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). This Court must not hesitate to do the same in cases where damages are sought for racial discrimination. Notwithstanding official efforts to alleviate racial discrimination in the armed forces, the problem persists.[8] The official policy prohibiting racial discrimination can be accomplished most effectively through the threat of personal liability for the violation of a serviceman's constitutional rights.

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[8] In a recently published study on equal opportunity in the United States Army, minorities were found to be grossly underrepresented in the commissioned and noncommissioned officer ranks and to have received fewer promotions and a disproportioate number of punitive and administrative discharges and punitive confinements. *See generally* Office of the Deputy Chief of Staff for Personnel, Department of the Army, *Equal Opportunity: Fourth Annual Assessment of Military Programs* (May 1980) (hereinafter "Equal Opportunity Report").

B. Petitioners' Contention That Damage Suits Will Impede Military Effectiveness Is Unsupported And Unfounded.

Petitioners contend that the armed forces constitutes a "specialized community," apart from the civilian society, requiring a different set of rules to govern its conduct. The military, however, is no longer an insulated, specialized community. The modern military employs large numbers of civilians,[9] and is by no means limited to fighting men. Civilian and military personnel perform substantially the same work in a wide variety of fields. Indeed, many functions performed by military personnel, whether it be as engineer, physician, lawyer, musician, or cook, are similar, if not identical, to the functions performed in the private sector or other governmental areas.[10] The military is well integrated with the civilian society around it, and most military personnel now permanently reside offbase.[11] Thus, a large portion of military personnel function in roles virtually indistinguishable from those occupied by their civilian counterparts and live in the same society as do civilians. Yet they lack the same basic protections

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[9] In March, 1982, the United States Navy had 543,703 personnel on active duty and directly employed another 329,375 civilians. Directorate for Information Operations and Reports, Department of Defense, *Military Manpower Statistics* (Washington, D.C. 1982), and *Civilian Manpower Statistics* (Washington, D.C. 1982).

[10] *See, e.g.*, 10 U.S.C. §§ 4024 (accountants); 5578a (lawyers); 5579 (optometrists and pharmacists); 5707(d) (engineers); 6221 & 6222 (Navy and Marine Bands) (1976).

[11] *See* Comptroller General, *Report to the Congress: Lower Graded Military Personnel With Families Are Not Suitably Housed But Should Be*, at vi (Washington, D.C. 1979) (in a survey of available housing at six bases, the report found that of the 111,424 personnel counted, 90,600 resided off-base).

from official discrimination guaranteed to all by the Constitution.

Moreover, the expansive growth of modern military establishment has had far-reaching effects on our national life. Today, approximately four and one-half million men and women serve in the armed forces on either active reserve, or guard status.[12] This nation can ill afford to exclude such a large portion of its population from the fundamental protections of the Constitution.

Petitioners also contend that civilian courts lack the understanding and experience necessary for reviewing actions taken within the specialized military community. Pet. Br. at 26-28. But in the modern military, the civilian and military roles are no longer readily distinguishable, and civilian experiences easily carry over to the military setting. Moreover, the size and pervasiveness of the modern military makes it the rare individual either who has not personally served in the military or whose close family members have not served. Most important, however, is the undisputed fact that courts regularly analyze claims of discrimination in employment areas which require them to evaluate defenses based upon highly technical and unfamiliar evidence. *See, e.g., Hochstadt* v. *Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976) (examining the qualifications of a biomedical researcher in an employment discrimination claim).

Because of the specialized nature of the military, petitioners argue that the discipline necessary to maintain

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[12] As of March 31, 1982, 2,107,028 were on active duty, and 2,334,510 were on reserve or guard status. *Military Manpower Statistics, supra,* at 3.

military effectiveness would be seriously disrupted if any damage actions were allowed to proceed. Pet. Br. at 20-26. Petitioners, however, can cite no evidence to support their contention that damage suits would undermine either military discipline or effectiveness. In the somewhat analogous situation of prison officials, the courts have rejected the need for wholesale immunity. For years, prison administrators argued that prison discipline would be destroyed if they were granted anything short of absolute immunity from damage suits brought by prisoners. But when this Court directly addressed the issue, it held that federal prison officials required only a qualified immunity. *United States* v. *Muniz*, 374 U.S. 150, 165 (1963). In *Muniz*, as in the case at bar, the defendants were unable to produce any evidence that prisoners' litigation would damage prison discipline. *Id.* at 163.

In the nineteen years since *Muniz*, the nation's prisons have continued to operate effectively. More important, the imposition of qualified immunity can be credited for prompting recalcitrant prison officials to correct many serious violations of prisoners' civil rights.[13] Ironically, under petitioners' view of the law, convicted criminals who have harmed society are entitled to vindicate violations of their constitutional rights, while individuals who voluntarily serve their country in the armed forces would be denied the same protection.

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[13] *See generally*, Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 639 (1979) ("Nearly everyone we interviewed believed that the cases have had great impact. Many pointed out that even losing cases have resulted in reform.").

Military discipline will not be crippled if officers are not absolutely shielded from liability when their actions violate the constitutional rights of others. Providing aggrieved servicemen with an opportunity to obtain financial redress for violations of their constitutional rights would provide an incentive to the military and its personnel to observe more carefully those constitutional rights. The result would help raise the military's public image, and would also end the adverse publicity created by abuses of military authority, which can only impair recruitment and ultimately impede efforts to maintain our effective, all-volunteer armed forces.

Minority group members comprise a disproportionate number of the enlisted personnel relative to commissioned officers. *Equal Opportunity Report, supra,* App. 1. Our military effectiveness relies on these men and women. The greater the perception of unredressed racial discrimination in the armed services, the less dedicated to our national defense they will be. *See generally* Note, *Intramilitary Immunity and Constitutional Torts,* 80 Mich. L. Rev. 312, 330-31 (1981).

Courts already review certain aspects of the modern military without adverse effects on military discipline, morale, or effectiveness. *See, e.g., Frontiero* v. *Richardson,* 411 U.S. 677 (1973) (plurality opinion) (voiding regulation providing servicewomen with lesser allowances than provided servicemen); *Bell* v. *United States,* 366 U.S. 393 (1961) (reversal of army's refusal to pay former soldiers who, while prisoners during the Korean War, had betrayed fellow prisoners); *Harmon* v. *Brucker,* 355 U.S. 579 (1958) (statutory authority exceeded in draftee's less than honorable discharge). Of course, suits that are brought by servicemen against their superiors for injunc-

tive relief necessarily raise the spectre of a contempt citation in the event of non-compliance. Surely, that possibility is no less disruptive of discipline than would be a suit for damages.

Petitioners also argue that if damage actions are allowed for violations of constitutional rights, as well as those based on common law torts, military officers will be unfairly subjected to all manner of frivolous suits which will further disrupt military discipline. Pet. Br. at 24. However, the fear that any common law tort can be pleaded as a constitutional violation cannot withstand scrutiny. The court of appeals considered this issue and noted that firm application of the summary judgment procedure would dispose of such lawsuits at an early stage. (Pet. App. 17a.) This Court too has twice addressed and rejected this contention:

> "Insubstantial lawsuits can be quickly terminated by federal courts alert to artful pleading. . . . [F]irm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits."

Harlow v. *Fitzgerald*, ... U.S. ....., 102 S. Ct. 2727, 2733 (1982), *quoting*, *Butz* v. *Economou*, 438 U.S. 478, 507-08 (1978).[14]

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[14] This Court has readily distinguished between legitimate allegations of violations of constitutional rights and common law torts camouflaged as constitutional claims. *See Estelle* v. *Gamble*, 429 U.S. 97, 106-07 (1976) (prisoner's claim for damages against prison officials and his treating physicians was really a tort claim for medical malpractice cognizable under state law, rather than a violation of constitutional rights); *Baker* v. *McCollan*, 443 U.S. 137, 146 (1979) (mistaken arrest and imprisonment based upon probable cause did not constitute a violation of constitutional rights, even though it might state a claim in tort).

Moreover, the recently enacted Equal Access to Justice Act ("EAJA"), P.L. 96-481, 94 Stat. 2328, § 204(b) (1982) (codified at 28 U.S.C. § 2412 (b)), would appear to allow the United States, upon prevailing in a civil rights action, to recover attorney fees from the plaintiff.[15] Thus, when frivolous claims are brought, the defendants may well shift the cost of their defense to the plaintiffs. This threat of possibly significant financial costs should discourage frivolous claims.

Despite petitioners' attempt to characterize allegations of the case at bar as "petty" complaints (Pet. Br. at 24), respondents' claims are cognizable only under the constitutional. No common law tort exists for denial of the equal protection of the laws. If a plaintiff can convince the court that the challenged conduct amounts to a true constitutional deprivation, he should be allowed to proceed.

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[15] Under the Civil Rights Attorney Fees Award Act, 42 U.S.C. § 1988, a court in its discretion may award fees to the prevailing party. Although this section specifically excludes the award where the United States is the prevailing party, the EAJA appears to remove this exception and places the federal government on par with other parties whether the suit is brought under 42 U.S.C. § 1985(3) or as a *Bivens* action. *See Lauritzen* v. *Secretary of Navy*, 546 F. Supp. 1221, 1227-29 (C.D. Cal. 1982) (plaintiff recovered fees from federal government under EAJA in *Bivens* action). *But see United States* v. *Miscellaneous Pornographic Magazines*, 541 F. Supp. 122, 129 (N.D. Ill. 1982) (no recovery of fees in *Bivens* actions; but, in dictum, recovery from federal government under EAJA in a section 1985 action).

Given the serious nature of petitioners' alleged acts, a grant of qualified immunity fairly balances both the parties' competing interests and the public interest. A complete bar in damage actions would allow military officers to discharge their duties without regard to their subordinates' fundamental civil rights.[16] Because the defendants have not demonstrated the presence of the "exceptional circumstance" compelling a need for absolute immunity, they are properly entitled to a qualified immunity only.

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[16] Several courts which have felt compelled to adopt the rationale of the *Feres* decision and grant absolute immunity have expressed dismay. *See, e.g., Labash* v. *United States Department of Army*, 668 F.2d 1153, 1156 (10th Cir.), *cert. denied*, 102 S. Ct. 2299 (1982) ("we are constrained to follow the *Feres* doctrine, notwithstanding its harsh result"); *Jaffee* v. *United States*, 468 F. Supp. 632, 633-34, 635 (D.N.J. 1979), *aff'd*, 663 F.2d 1226 (3d Cir. 1981) (en banc), *cert. denied*, 456 U.S. 972 (1982) ("with the greatest reluctance," the court was "forced to agree" that *Feres* prevented the plaintiff's recovery; it was "unfortunate" that *Feres'* immunity could not be limited to decisions made in the heat of battle); *Schmid* v. *Rumsfeld*, 481 F. Supp. 19, 25 (N.D. Cal. 1979) (the court "deplore[d] the lack of judgment shown by plaintiff's superiors"); *Thornwell* v. *United States*, 471 F. Supp 344, 348 n.1 (D.D.C. 1979) ("*Feres* appears to grant an immunity which is broader than necessary," which might "lead to unconscionable results.").

CONCLUSION

For the foregoing reasons, the Lawyers' Committee For Civil Rights Under Law, as Amicus Curiae, respectfully submits that this Court should affirm the judgment below of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: February 4, 1983

Office-Supreme Court, U.S.
FILED
FEB 10 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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No. 82-167

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS AMICUS CURIAE

INTEREST OF AMICUS*

The NAACP Legal Defense and Educational Fund, Inc., ("LDF") is a non-profit corpora-

* Letters of consent to the filing of this brief from counsel for the petitioner and the respondent have been filed with the Clerk of the Court.

tion incorporated under the laws of the State of New York in 1939. It was formed to assist blacks to secure their constitutional rights by the prosecution of lawsuits. LDF attorneys have represented parties and participated as amicus curiae in this Court and other courts in a broad range of cases involving the rights of black citizens. LDF attorneys have, historically, been active in protecting the rights of black servicemen and, recently, participated as amicus curiae in the Court of Military Appeals. United States v. Matthews, Dkt. No. 43538/AR, CM 439064.

STATEMENT OF FACTS

Respondents are five black Navy enlisted men who were subjected to an unrelenting pattern of systemic racial discrimination on board their vessel, the U.S.S.

Decatur. Their commanding officer systematically assigned them to the most menial of tasks [Complaint ¶ 12]; gave them adverse and unwarranted performance ratings [Complaint ¶¶ 19-22, 53, 113, 114]; denied them opportunities for advancement and training, which were instead offered to white sailors with less seniority and fewer qualifications [Complaint ¶¶ 53, 74, 75, 93, 94]; subjected them to intimidating, degrading and humiliating threats [Complaint ¶¶ 111, 112]; and unjustly disciplined them [Complaint ¶¶ 52, 114].

Respondents initially sought redress through existing naval channels. But their pleas for redress fell upon deaf ears.[1/]

1/ The court of appeals found that respondents had alleged exhaustion of administrative remedies and accordingly remanded to the trial court for a factual determination on this matter. 661 F.2d at 731 n.2.

[footnote continued]

Respondents then turned to the only avenue of redress open to them. They filed a Bivens action seeking compensatory and punitive damages for the violations of their fifth amendment rights.

The government's argument that respondents should be denied a remedy must be viewed against the background of pervasive and persistent racial discrimination in the military. See Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 267 (1977). Although the meritorious service of blacks in the Navy dates to the Revolutionary War,[2/] in modern times, blacks have

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[footnote continued]

Because this case is here on a motion to dismiss, all of the allegations must be taken as true. Scheuer v. Rhodes, 416 U.S. 232, 236(1974).

2/ Mueller, The Negro in the Navy, 24 Social Forces 110 (1945); Bureau of Naval

[footnote continued]

served primarily as messmen and stewards.[3/] At the beginning of World War II, blacks constituted only 2.9% of the Navy, and there were only 6 blacks on active duty who were not messmen.[4/]

The Navy eventually yielded under presidential pressure and announced on April 7, 1942 that it would accept blacks

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[footnote continued]

Personnel, The Negro in the Navy 1 ("Naval Personnel"), reprinted in VI Blacks in the United States Armed Forces: Basic Documents, 305, 309 (M. McGregor & B. Nalty ed. 1977) ("McGregor & Nalty").

3/ Naval Personnel, supra, at 1 reprinted in McGregor & Nalty, supra, at 309. In this regard, it is striking to note that three of the five respondents here, Cornelius Hickey, James Richardson, and George Shannon, all had ratings as messmen.

4/ Naval Personnel, supra, 1-2, reprinted in McGregor & Nalty, supra, at 309-10.

for "general service" in "[a]ll ratings."[5/] But it did not do so. Rear Admiral Jacobs, Chief of Naval Personnel, decreed that: "Apprentice seaman is the only rating in which negroes may be enlisted except those messman ratings previously authorized."[6/] Additional presidential pressure -- applied after

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5/ Dep't of Navy News Release (Apr. 7, 1942), reprinted in McGregor & Nalty, supra, at 103. In rejecting the President's first proposal, that the Navy accept 5,000 blacks, a Marine general noted that "the negro race has every opportunity now to satisfy its aspirations for combat, in the Army -- a very much larger organization than the Navy or Marine Corps, -- and their desire to enter the naval service is largely, I think, to break into a club that doesn't want them." Hearings Before the General Board of the Navy 1942, reprinted in McGregor & Nalty, supra, at 49.

6/ Recruiting Circular Letter No. 86-42 (May 18, 1942), reprinted in McGregor & Nalty, supra, at 116.

noting the Navy's dismal record as compared with the Army[7/] -- forced the Navy to make some short-lived progress; it integrated auxiliary vessels toward the end of the war. But the Navy reverted to its prior pattern by 1947. At that time, only 4.4% of the Navy was black, and 80% of the blacks were serving as cooks, stewards or stewards mates. Less than 2% of the whites served in the same capacities. In contrast, the Army was 8.2% black, 9% of which were in the top

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7/ In a memorandum for the Secretary of the Navy, President Roosevelt noted that the Army had met his directive that blacks be used in proportion to their numbers in the general population, "but the Navy is so far below...." reprinted in McGregor & Nalty, supra, at 130-131. At the time, the figure was 10%. While the Army met this goal in a matter of months, the Navy took 38 years to do so; it did not reach the 10% goal until 1980. U.S. Dep't of Defense, Defense 81, Special Almanac Issue 21, 26 (Sept. 1981) (Navy was 9.7% black in Sept. 1979; 10.4% in Sept. 1980). By then the Army stood at 29.6% black. Id.

three grades. Report of the President's Commission on Civil Rights, To Secure These Rights 42, 45 (1948) ("Civil Rights Report"). This same pattern remains true today; the Navy recruits fewer blacks than any other service.[8/]

8/ See n.7 supra, and n.12 infra. Between 1949 and 1965 the percentages of blacks increased from 12.4 to 13.4% in the Army, 5.1 to 10.0% in the Air Force, 2.1 to 8.7% in the Marine Corps, and only 4.7 to 5.8% in the Navy. Stillman, Negroes in the Armed Forces, 30 Phylon 139, 143 (1969). Similarly, while the Army and the Air Force had 7,622 and 3,106 cadets each in ROTC units at 15 major black colleges in 1964-65, there were no Navy ROTC programs at black schools. Id. at 145. Of course, the same pattern held true for non-commissioned officers. Between 1953 and 1965, the number of black non-commissioned officers in the Army rose from 14.7 to 16.3%, and from 11.1 to 13.1% in the Air Force and from 8 to 8.4% in the Marines. In contrast, the Navy only increased from 4.3 to 5.8%. Id.

The Navy's record in promoting blacks to officer rank is no better. Under pressure to promote blacks to officer,[9] the Bureau of Naval Personnel could only bring itself to concur on the following basis:

> However unpalatable the idea may be, it is believed certain that ... the Navy will be required to do so.... If the Navy prepares a limited program there is much less danger that it will be required to take much greater numbers of [black] officers on any certain percental [sic] basis.[10]

By 1947, there was still no black officer with a regular commission. Granger, Racial Democracy -- The Navy Way, 7 Common Ground

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9/ Undersecretary Adlai E. Stevenson observed that "one reason we have not had the best of the race is the suspicion of discrimination in the Navy." Memorandum (Sept. 29, 1943), reprinted in, McGregor & Nalty, supra, at 141.

10/ Memorandum for the Chief of Naval Personnel, reprinted in, McGregor & Nalty, supra, at 142.

61, 67 (1947). In 1948, there were but two black naval officers amongst 21,793 black enlisted men; while in contrast, there was one white officer for every seven white sailors. Similarly, the Coast Guard and the Marines had one and zero black officers respectively. This was an even worse record than the Army's, which had one black officer for every 70 black enlisted men, compared to a one to seven ratio for whites.[11/]

Although the advent of the all volunteer forces of the 1970's has increased black

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11/ Civil Rights Report at 42, 45. The persistence of this pattern is further evidenced by the fact that by 1965 the percentage of black officers in the Navy had only reached 0.3%. Stillman, supra, at 143.

participation in most of the military,[12] the available data shows the persistence of discrimination in promotions, job assignments and discipline.[13] Indeed, one scholar concluded that "it appears that being white in the Army is more important than doing well...."[14]

12/ As of September 30, 1980, 29.6% of the Army was black. U.S. Dep't of Defense, Defense 81, Special Almanac Issue (Sept. 1981). Similarly, blacks constituted 20.6% of the Marine Corps, and 14.1% of the Air Force, but only 10.4% of the Navy. Id.

13/ Butler, Inequality in the Military: An Examination of Promotion Time for Black and White Enlisted Men, 41 Am. Soc. Rev. 807, 817 (1976); See Butler, Assessing Black Participation in the Army, 23 Social Problems 558, 565, (1976); Miller and Ransford, Inequality in the Military: Implications for Organizations, Occupational Mobility and Social Stratification, 6 J. of Political & Military Soc. 65, 68 (1978); Segal and Nordlie, Racial Inequality in Army Promotions, 7 J. of Political & Military Soc. 135 (1979); Perry, An American Dilemma at Sea: Race and Incarceration in the Naval Justice System, 41 Phylon 50, 56 (1980) .

14/ Butler, supra, 41 Am. Soc. Rev. at 817.

In sum, the American military has been plagued with entrenched and enduring racial discrimination. And the Navy has been, and continues to be, the greatest offender.

SUMMARY OF ARGUMENT

The government's argument that the action of military officers should not be reviewable by civilian courts goes beyond the grant of certiorari and the long line of cases in this Court holding the actions of the military, like other departments of the government, to the commands of the Constitution. It ignores the congressional scheme which emphasizes the accountability of the military to civilian authority. It ignores the fact that the military is particularly unsuited to evaluate constitutional claims of service members and that the Court has already upheld the availability of a damage

action against military officers in a case involving the eighth amendment.

The demands of military discipline are adequately protected by the broad qualified immunity available to government officials under Harlow v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 396 (1982). The government would have the Court create a new absolute immunity for military officers that has no foundation either in common law precedent or constitutional heritage or structure. In over a century and a half of legislation dealing with suits against military and other government officers, Congress has consistently declined to provide absolute immunity to military officers other than medical personnel.

Servicemen have a cause of action directly under the fifth amendment for racial discrimination. There are no special

factors counseling hesitation. The concerns articulated by the government are already protected by the broad Harlow immunity. Congress has given no indication that the internal procedures available to servicemen were intended to be exclusive substitutes for a Bivens cause of action. The internal military procedures are not as effective; they do not provide full compensatory or punitive damages or adequate deterrence to would be wrongdoers. Indeed, absent a Bivens remedy, a serviceman would have no effective remedy for violations of clear cut constitutional rights, such as the right to be free of racial discrimination.

ARGUMENT

I.

THE MILITARY IS NOT AN EXTRA-CONSTITUTIONAL BRANCH OF GOVERNMENT

A. Like Every Other Department of Government, the Military is Subject to the Rule of Law

Under the government's argument, no matter how much extra-constitutional power a military officer arrogates to himself, and no matter how seriously he infringes the basic constitutional rights of another serviceman, his actions would be unreviewable in a "civilian" court.[15/] The only relief

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15/ Despite the limited grant of certiorari to the question of the availability of a damage action, the government's position is that "civilian" courts can never take cognizance of a serviceman's allegation of a constitutional violation by a military officer because review by civilian courts is disruptive of the military system. Brief for Petitioners at 26-29. The logic of the government's position would bar even injuctive relief against blatant constitutional violations.

available to the serviceman would be that provided by the internal military structure itself.

The entire thrust of the government's argument that the military should be removed from the realm of the constitutional process is the demand of military necessity. But the Court has accommodated the special needs of the military while retaining the basic structure of the Constitution. In these circumstances, the special nature of military service can be met by granting military officers qualified immunity under Harlow v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 396 (1982), and by sensitively applying the commands of the Constitution to the military context. The government's position of absolute unaccountability, however, "would be contrary to the basic concept of separation

of powers and the checks and balances that flow from the scheme of a tripartite government," United States v. Nixon, 418 U.S. 683, 704-705 (1974), (citing The Federalist, No. 47, at 313 (S. Mittel ed. 1938)). See also Duncan v. Kahanamoky, 327 U.S. 304, 322-23 (1946).

By explicitly exempting the military from the grand jury requirement of the fifth amendment, the drafters made clear that the military is otherwise bound by the amendment.[16/] This Court has repeatedly declined to allow "military necessity" to override the basic rule of law. E.g., Duncan, 327 U.S. at 322-323. "[E]ven the war power does not remove constitutional limitations safe-

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16/ See Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 188-89, 193 (1962); Quinn, The United States Court of Military Appeals and Military Due Process, 35 St. John's L. Rev. 225 (1961).

guarding essential liberties." United States v. Robel, 389 U.S. 258, 263-264 (1967); see Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156 (1919); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); see also United States v. United States District Court, 407 U.S. 297, 320 (1972). The courts have traditionally been available to vindicate the constitutional rights of service members.[17/] Contrary to the government's assertion, in the area of habeas

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17/ See, e.g., Brown v. Glines, 444 U.S. 348 (1980) (first amendment); Parker v. Levy, 417 U.S. 733 (1974) (due process-vagueness); Frontiero v. Richardson, 411 U.S. 677 (1973) (equal protection); Parisi v. Davidson, 405 U.S. 34 (1972); Burns v. Wilson, 346 U.S. 137, 142 (1953) (due process); cf. Rostker v. Goldberg, 453 U.S. 57 (1981) (equal protection challenge to military registration system); Harmon v. Brucker, 355 U.S. 579, 581-82 (1958) (challenge to less than honorable discharge: "judicial

(footnote continued)

corpus review of convictions for constitutional error, the standard of review for courts-martial is the same as that for state court judgments. Compare Burns v. Wilson, 346 U.S. 137 (1953), with Stone v. Powell, 429 U.S. 874 (1976).

On the other hand, the lack of expertise on the part of the military to evaluate constitutional claims of service members has often been recognized.[18/]

(footnote continued)

relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers"). High level military officers in the Judge Advocate General's Corps have themselves recognized that the military will be held accountable to the Constitution. Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 M.I.L. Rev. 1(1975).

18/ Noyd v. Bond, 395 U.S. 683, 696 n.8 (1969); McElroy v. United States, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955).

Indeed, the Court has already sustained the availability of a damage remedy against a military officer who had abused the rights of a serviceman. Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849) ("Wilkes I"); Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851)("Wilkes II"), see discussion, infra, at 29, 36-37. The Wilkes court specifically refused to extend absolute immunity to military commanders: "[t]he humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office." 48 U.S. at 123.

B. Military Necessity Does Not Require Unaccountability to Civilian Authority

The qualified immunity articulated in Harlow, affords officials sufficient "breathing room" to make necessary decisions; it even allows room for errors of judgment.

Harlow protects government officials from liability except for violations of clear-cut constitutional rights. Rather than "second-guessing" military commands, civilian courts would only be correcting clearly unconstitutional conduct.

Moreover, civilian courts have repeatedly displayed their sensitivity to the specialized needs of the military. The decisions of this Court bear witness to the ability of civilian courts to appreciate those needs and to shape constitutional doctrine to fit the military context.[19/]

Ultimate responsibility to civilian authority is the principle which Congress has consistently adopted in this area. So

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19/ See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding draft registration of males); Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974).

pervasive is the notion of civilian control that, when Congress created a military court system for courts-martial, it staffed the highest appellate court of that system, the United States Court of Military Appeals, with civilian judges. 10 U.S.C. §867(a)(1). It did so even though it was presented with the same argument now put forth by the government -- that only those intimately acquainted with the special needs and mores of military life could sit in judgment of service members. See 96 Cong. Rec. 1305-1306. Civilians review military actions and decisions in other contexts as well.[20/]

20/ See, e.g., Harmon v. Brucker, 355 U.S. 579 (1958) (propriety of less than honorable discharge subject to judicial review); 10 U.S.C. § 1552 (Board for Correction of Military Records composed of civilians).

C. The Military is Ill-Suited to Police Racial Discrimination Within its Ranks

The history of the military, particularly the Navy, in dealing with black servicemen is instructive. When the President directed the naval hierarchy to increase black enlistments, it resisted. Senior naval officers deemed it contrary to "the best interests of general ship efficiency" and "the national defense" to allow blacks to serve in other than the messman branch.[21/] That senior military officials could perceive even minimal steps toward equal treatment as a threat to national security demonstrates the unsuitability of entrusting enforcement of basic constitutional provisions to those whose perceptions are shaped largely by the

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21/ Memorandum From the Chief of the Bureau of Navigation to the Chief of Naval Operations, October 24, 1941, reprinted in McGregor & Nalty, supra, at 11.

exigencies of the moment. Officials need not be corrupt or morally bankrupt in order to disregard express and fundamental constitutional requirements; they need only have their vision narrowed by their immediate concerns. Enforcement of fundamental principles must thus be entrusted to institutions and individuals better situated to obtain a wider perspective.

In sum, the government's claim would exempt the military from Article III review and make it unaccountable for violations of the fundamental constitutional rights of servicemen. The government is thus correct that there is a separation of powers issue here. It is, however, not that the judiciary threatens to undermine the military "branch," but that the military wants to opt out of our system of checks and balances to

avoid an "inefficient" concern for constitutional rights. If military officers are unaccountable in a civil court for civil rights violations, then the parade of horrors is endless because it makes large-scale, systematic violations of civil rights possible.

II.

MILITARY OFFICIALS ARE ENTITLED TO QUALIFIED AND NOT ABSOLUTE IMMUNITY

The government argues for absolute immunity to protect the vigorous exercise of official authority. This ignores the framework established by this Court for balancing this interest with the vindication of constitutional guarantees. Harlow, 73 L.Ed.2d at 403-04, 407-08. It also ignores the fact that Congress has consistently declined to immunize military officers.

A. This Court Should not Legislate Absolute Immunity for Military Officers When Congress has Consistently Declined to Do So

The Constitution gives Congress primary power and responsibility for the governance of the military. Article I, Section 8 empowers Congress "[t]o declare War," Cl. 11, "[t]o raise and support Armies," Cl. 12, "[t]o provide and maintain a Navy," Cl. 13, "[t]o make Rules for the Government and Regulation of the land and naval Forces," Cl. 14, "[t]o provide for calling forth the Militia to execute the Laws of the Union," Cl. 15, and "[t]o provide for organizing, arming, and disciplining, the Militia...." Cl. 16. Congress's power over the armed forces extends to every aspect, and explicitly includes discipline. It is for Congress in the first instance, then, to determine if disciplinary needs require

legislation granting officers absolute immunity from damage suits by servicemen.[22/]

Over two centuries, Congress has repeatedly addressed the question of the liability of officers for damages. Rather than providing for absolute immunity, it has

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22/ The Court is not now faced with the issue of balancing a declaration by Congress that certain military officers are absolutely immune from damages against anv particular civil rights violation, such as race discrimination. Even in that instance, the Court should not abdicate its responsibility to review issues involving the military, but would have to balance Congress's special and explicit Article I power with the Court's Article III power to enforce the Bill of Rights. The Court, however, is being asked to create a conflict by legislating an absolute immunity where Congress has consistently declined to shield the military from the dictates of the Bill of Rights.

traditionally provided for removal to a federal court.[23/] When Congress passed the removal statutes, military officers were subject to liability even though their actions were strictly in compliance with orders from a superior officer, including

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23/ Motivated by New England's resistence to the War of 1812, Congress passed the Act of February 4, 1815, § 8, 3 Stat. 195, 198-199, which provided for removal to federal courts for common law suits of assumpsit against the collectors of customs for overassessments. See Elliott v. Swarthout, 35 U.S. (10 Pet.) 137 (1836). The South Carolina Ordinance of Nullification, 1 Stat. (S.C.) 329 (Nov. 24, 1832), required the courts of that state to resist enforcement of the Federal Tariff Act of July 14, 1832. Rather than confer absolute immunity on officers in response to South Carolina, Congress instead provided for removal to a federal court. See Act of March 2, 1833, 4 Stat. 632, 633-34 (current version at 28 U.S.C. § 1442a (1976)). Congress again chose removal rather than immunity even when nullification became secession. Act of March 3, 1863, Ch. 81, § 5, 12 Stat. 756-57, as amended, Act of May 11, 1866, Ch. 80, §§ 3-4, 14 Stat. 46. Removal protection was later extended to members of the armed forces. Act of August 29, 1916, § 3, Art. 117, 39 Stat. 619, 669.

the President of the United States.[24/]

Wilkes I and II were decided in 1849 and 1851, respectively. Congress was aware of the holding of these cases that military officers were not absolutely immune from suits by servicemen. Yet it let these cases stand and, in acting 12 years later to protect military officers from suit, it declined to grant them absolute immunity but instead

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24/ See, e.g., Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (commander of warship answerable in damages to any person injured even though commander was simply obeying orders from President); Bates v. Clark, 95 U.S. (5 Otto) 204, 209 (1877) (military officer is liable in peacetime in trespass action despite fact that officer acted in good faith upon orders of superior).

provided them with an "obedience to orders" defense.[25/]

To this day, Congress has only once exercised its power and granted absolute immunity to military personnel -- to medical officers. 10 U.S.C. § 1089 (1979). See Howell v. United States, 489 F. Supp. 147 (W.D. Tenn. 1980); Hernandez v. Koch, 443 F. Supp. 347 (D.D.C. 1978). That Congress saw fit to single out medical personnel in the armed forces and provide them with absolute immunity indicates that it acknowledged

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25/ It was only during the Civil War that Congress provided officers with a defense when their actions were pursuant to an order issued by the President or Secretary of War. Act of March 3, 1863, ch. 81, § 4, 12 Stat. 755, 756 (1863). This defense "expired by its own limitation." The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 254 (1867). Only the protection of removal to federal court remained. The need for discipline in the military was equally important during the Civil War, and, before that, when the country was still a fledging, young nation. Yet Congress refrained from granting absolute immunity even during the most tumultuous of times.

both the continuing validity and wisdom of the Wilkes rule. This Court should not disturb Congress's judgment.

B. Military Officers Are Entitled to Only Qualified Immunity Under Harlow v. Fitzgerald

Twice in recent years the Court has considered and rejected the plea of executive officials that absolute immunity is critical to their ability to exercise discretion and to act decisively. Harlow, 73 L.Ed.2d at 407; Butz v. Economou, 438 U.S. 478, 506 (1978). In each instance, the Court adopted a doctrine of qualified immunity, reasoning that it was critical: (1) to deter the officers from committing constitutional wrongs, Harlow, 73 L.Ed.2d at 404, 411; Butz, 438 U.S. at 505; (2) to provide redress to the injured party, Harlow, 73 L. Ed. 2d at 407-08, 411; Butz, 438 U.S.

at 505; and (3) to avoid "draw[ing] a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Harlow, 73 L. Ed. 2d at 404 (quoting Butz, 438 U.S. at 504).[26/] Most important, the Court emphasized that, "[f]or executive officials in general, ... our cases make plain that qualified immunity represents the norm." Id. at 403.

To be entitled to such an extraordinary defense, the defendant

> must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the

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26/ See Scheuer v. Rhodes, 416 U.S. 232 (1974) (state military officials have only qualified immunity in § 1983 actions).

> protected function when performing the act for which liability is asserted.

Id. at 407 (footnotes omitted).

The government's argument that the officers's functions are specially protected because they involve military functions is without support. Harlow itself involved a suit by an employee of the Department of the Air Force against senior aides and advisors of the President of the United States. Those officials were not entitled to absolute immunity despite their high level status, the fact that the plaintiff was an Air Force employee, and the national security concerns that informed their conduct.

Absolute immunity for special functions have been limited to legislative functions, see Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), judicial functions, see Stump v. Sparkman, 435 U.S. 349

(1978), adjudicative functions, Butz, 438 U.S. at 513-517, and the function of the President of the United States. See Nixon v. Fitzgerald, ___ U.S. ___, 73 L. Ed. 2d 349 (1982). As in Harlow, none of these special functions is present in this case.[27/] While the government would have the Court create a new military function exception, it fails to identify either the historical or constitutional foundation that must support such a departure.

Any grant of absolute immunity must be premised on

> considerations of public policy, the importance of which should be confirmed either by reference to the common law

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27/ Although the government would like to raise the spectre of rebellion in the trenches and in the midst of battle, that has nothing to do with this case. Whether military decisions made in combat or wartime constitute a "special function" is not at issue here. These acts of race discrimination occurred in a non-combat peacetime situation.

> or, more likely, our constitutional heritage or structure.

Harlow, 73 L.Ed.2d at 407 n.20. In each case where the Court found absolute immunity, it identified either a common law antecedent or a basis in constitutional text or structure.[28/] Neither of these bases exist here.

Common law precedent counsels strongly against the extension of an absolute immunity to military officers. Cf. Pierson v. Ray, 386 U.S. 547, 555(1967)(police officers receive only qualified immunity as at common law). The common law explicitly refused to

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28/ See, e.g., Nixon v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 349, 362-64 (1982) (President's immunity rooted in "constitutional heritage and structure" and is based on his "unique position in the constitutional scheme"); Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976) ("common-law immunity of a prosecutor"); Gravel v. United States, 408 U.S. 606 (1972) (Speech and Debate Clause); Pierson v. Ray, 386 U.S. 547 (1967) (§ 1983 does not abrogate common law absolute immunity of judges).

give superior military officers absolute immunity from damage suits by servicemen. Wilkes I, 48 U.S. at 89; Wilkes II, 53 U.S. at 390.

In Wilkes, the commander refused to release a sailor upon expiration of his term of service and disciplined him when he refused to serve. Notwithstanding the officer's acquittal at court-martial, the Court permitted the sailor to sue his commanding officer for assault and battery, false imprisonment and cruel and unusual punishment in violation of the eighth amendment. The Court recognized the importance of vindicating the officer's authority. Nonetheless, it noted that

> the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice.

Wilkes II, 53 U.S. at 403. The commander

was therefore afforded only the then-prevailing version of qualified immunity. Id. at 404. There is thus no common law antecedent which would support absolute intra-military immunity.29/

In sum, there is no common law confirmation for the public policy arguments advanced by the government. Whether read as precedent directly on point or as the common law antecedent to this case, Wilkes supports the application of the general rule of qualified immunity.

29/ Only recently, in the Butz decision, this Court emphasized that Wilkes had not been overruled and ultimately used it as a basis for denying absolute immunity to federal officers. 438 U.S. at 493 n.18, 494. See also Feres v. United States, 340 U.S. 135, 141-42 n.10 (1950). The government argues that Feres should persuade the Court to extend the absolute immunity granted to the government in that case to the officers in this case. But Feres had a strong foundation in the common law doctrine of sovereign immunity. There is no common law antecedent of absolute immunity for officers.

Nor is there any support for the government's alleged public policy concerns in the "constitutional heritage or structure." Harlow, 73 L.Ed.2d at 407 n.20. See Points I.A. and II.A., supra. Rather, everything in the constitutional text, congressional practice, and the decisions of this Court establish that military officers are governed by the Constitution, civilian authority, and the courts.

Absent confirmation from either source, the government nevertheless advances public policy concerns which, it claims, justify absolute immunity. It argues that the possibility of damage suits will (1) encourage servicemen to disobey orders and (2) have a chilling effect on an officer's ability to act and give orders without hesitation. But, allowing civilian courts to

entertain damage actions will not undermine military discipline. To the extent damage actions implicate discipline concerns at all, they presuppose obedience to orders. Even if the existence of a damage remedy could strain the relationship between officer and soldier, the existence of any effective remedy, would have that same effect.[30/] But, it is questionable whether a decline in morale or discipline could ever be traced to the existence of a remedy. It would strain credulity to believe that a well-disciplined military unit with high morale would suddenly disintegrate or become disaffected merely because a remedy for serious injustice is created.

30/ See discussion, infra, at 54 n.37.

Disaffection and disobedience are more likely to result from the perpetuation of serious injustice such as racial discrimination than from the existence of a particular remedy.[31/] A graphic example is provided by the experience of black sailors during World War II. In March of 1944, Secretary of the Navy Forrestal appointed Lester B. Granger as his civilian aide on racial matters. In that capacity, he toured some 67 naval facilities at home and in the Pacific.

31/ As one authority observed:

> Discipline, order, and routine are essentials to a military organization. Civilians from a democratic society, even an imperfectly democratic society, willingly submit themselves to such authoritarian direction only when they believe in the purpose and fairness of the system.

Reddick, The Negro in the Navy in World War II, 32 J. of Negro Hist. 201, 209 (1947).

Granger, Racial Democracy -- The Navy Way, 7 Common Ground 61, 64 (1947). He reported that "morale and the performance of the Negro servicemen compared favorably with that of whites except where rank discrimination existed or was believed to exist."[32/]

Most notable was the reaction of a battalion of black Seabees, well known for their meritorious performance of duty, to wrongful treatment at the hands of their commander:

> Charging unfair and racially discriminatory treatment by the white commanding officer, they ... went on a hunger strike that lasted several days.... The strike ended with the [transfer] of the commanding officer in question, and the battalion was shortly shipped back overseas to Okinawa to resume meritorious performance.

Granger, supra, 7 Common Ground at 63.

32/ Reddick, supra, at 215.

Nor will allowing damage actions "chill" the officer's ability to give orders without hesitation. In Harlow, the Court dropped the subjective "malice" element of the good faith defense and expanded the qualified immunity defense so that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 73 L.Ed.2d at 410.[33/]

33/ The government's other argument, the fear of insubstantial or frivolous lawsuits, see Brief for Petitioners at 23-24; Brief of Amicus Curiae the Washington Legal Foundation at 12, is unfounded because the Court modified the qualified immunity standard in Harlow to meet exactly that concern. 73 L.Ed.2d at 409-11. Thus, insubstantial lawsuits not involving clear constitutional violations are to be dealt with on summary judgment on the immunity issue before discovery is allowed. Id. at 411.

[footnote continued]

Officers will be free to act except in derogation of clear-cut constitutional rights. The government quotes Orloff v. Willoughby, 345 U.S. 83, 94 (1953), entirely out of context for the proposition that "[d]iscrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others to soft spots." Brief for Petitioners at 25. Orloff was not sanctioning racial discrimination in the army. The government implies that blacks could, without civil relief, be assigned to all "the dangerous missions," and whites to the "soft

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[footnote continued]

This also dispels the government's floodgates argument. See Brief for Petitioners at 26. While the nature of military life may inevitably give rise to tensions and unfairness, it is only claims of violations of clearly established rights -- not complaints ingeniously translated into constitutional claims, Brief for Petitioners at 23-24 -- that will survive a motion to dismiss.

spots," because that is part of the "extra-ordinary demands that military life, in all its aspects, places on servicemen." Id. at 25. Although there are special obedience demands on servicemen, those demands do not require or suggest that orders given on the basis of race in violation of the fifth amendment should not be subject to relief in a civil court. The Harlow defense gives military officers adequate protection where they are entitled to it; it also properly denies them sanction for unconstitutional racial discrimination.

III.

ENLISTED MEN HAVE A BIVENS ACTION AGAINST THEIR SUPERIOR OFFICERS FOR ACTS OF RACIAL DISCRIMINATION

A. The Court Has Already Established a Bivens Cause of Action for Discrimination in Violation of the Equal Protection Component of the Due Process Clause

> In a number of closely related contexts, this Court has already settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right.

Davis v. Passman, 442 U.S. 228, 242 (1979) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)). See also Davis, 442 U.S. at 234 and cases cited therein.

The Court, moreover, has already acknowledged that service members have a cause of action against their superiors for

discrimination in violations of the fifth amendment. In Frontiero v. Richardson, 411 U.S. 677 (1973), United States Air Force Lieutenant Sharron Frontiero sued the Secretary of Defense for sex discrimination in the disbursement of statutory benefits for dependents. Thus, a service member has a constitutionally protected right to be free of discrimination and he has a cause of action against his superiors to effectuate that right. Under Wilkes, he can also sue for damages.[34/]

Under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), and its progeny, there is a presumption that the victim has an action for damages against a federal officer for the violation of a

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34/ As discussed supra, at pp. 35-36, Wilkes involved a claim for damages for the violation of the serviceman's rights under the eighth amendment.

constitutional right. Davis, 442 U.S. at 242, 245; Carlson v. Green, 446 U.S. 14, 18 (1980). This cause of action may be defeated in a particular situation only if (1) there are "special factors counselling hesitation in the absence of affirmative action by Congress," Bivens, 403 U.S. at 396; Davis, 442 U.S. at 245; Carlson, 446 U.S. at 18, or (2) defendants show that "Congress has provided an alternative remedy which is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." Carlson, 446 U.S. at 18-19, (citing Bivens, 403 U.S. at 397) (emphasis added); Davis, 442 U.S. at 245-247. As we show below, none of these factors exists in this case.

B. There are no Special Factors Counseling Hesitation

In Davis, the Court rejected the congressman's "independent status in our constitutional scheme," Carlson, 446 U.S. at 19, and his immunity under the Speech and Debate Clause as special factors counselling hesitation. Davis, 442 U.S. at 246. In Carlson, it rejected the fact that "requiring [prison officials] to defend respondent's suit might inhibit their efforts to perform their official duties," id., 446 U.S. at 19, as a special factor. In each case, it held that the available immunity adequately protected those concerns.

The case for finding a special factor here is even weaker than in Carlson or Davis. In Carlson, the Court found that the Butz qualified immunity was enough to protect the prison officer from any hesitation

in performing his duty. 446 U.S. at 219.[35/] Since then, however, the Court has significantly strengthened that defense; officers would be protected even for malicious actions not in derogation of established constitutional rights. See Harlow, 73 L. Ed. 2d at 409-10. In Davis, the potential defendant

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35/ It should be pointed out that every argument advanced by the government with respect to the need for discipline in the military has an analogue in the prison context that is at least equally strong.

> Prison life, and relations ... between the inmates and prison officials or staff, contains the ever present potential for violent confrontation or conflagration.

Jones v. North Carolina Labor Union, 433 U.S. 119, 132 (1977). "Guards and inmates exist in direct and intimate contact. Tension between them is unremitting." Wolff v. McDonald, 418 U.S. 539, 562 (1974). Compare Brief for Petitioners at 31. The danger of a breakdown of discipline in prisons is, if anything, greater than that in the military, and a great deal more imminent. Yet damage actions were allowed in Carlson.

had independent constitutional stature protected by an absolute immunity explicit in the constitutional text. Here, the military officer lacks any constitutional status that places him above the law and is, at most, entitled to a common law qualified immunity. See Wilkes I and II.

C. There is no Alternative Remedy That Congress has Explicity Declared is a Substitute

The statutory scheme for the armed forces does not provide an alternative remedy adequate to defeat the existence of a Bivens cause of action. Under Carlson, the test is whether

> Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.

446 U.S. at 18-19 (emphasis added). The

military statutory scheme fails to satisfy this part of the Bivens test. The government does not even suggest that Congress has ever provided an alternative remedy which it explicitly declared to be a substitute for a Bivens remedy.

In Carlson, the prisoner could bring suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680. Nevertheless, the Court held that he had a Bivens action. It reasoned that there was no indication in the FTCA or its legislative history that Congress viewed the FTCA as an exclusive remedy. Rather, there was every indication that Congress considered the FTCA complementary to a Bivens remedy.[36/]

36/ It noted that when Congress has wanted to indicate that the FTCA is an exclusive remedy, it has done so. See, e.g., 38 U.S.C. § 4116(a), 42 U.S.C § 233(a), 42

(footnote continued)

Here, there is no legislative indication or history that the internal military procedures -- the Board for the Correction of Naval Records, 10 U.S.C. §1552(& Supp. V) ("the Board") and Article 138 of the Uniform Code of Military Justice 10 U.S.C. § 938 ("Article 138") -- were explicity or even implicitly intended by Congress to be exclusive substitutes for a Bivens remedy. Congress has had more than a full century since Wilkes I and II to declare that these two statutory schemes are exclusive, but has not done so.

(footnote continued)

U.S.C. § 2458(a), 10 U.S.C. § 1089(a), and 22 U.S.C. § 817(a) (malpractice by certain government health personnel); 28 U.S.C. § 2679(b) (operation of motor vehicles by federal employees); 42 U.S.C. § 2476(k) (manufacturers of swine flu vaccine).

D. There is no Equally Effective Remedy

None of the existing internal military procedures, either individually or collectively, are as effective as a Bivens remedy. There are four factors to consider when evaluating whether the "alternative remedy" is "equally effective:" (1) whether the remedy has a deterrent effect; (2) whether punitive damages are allowed; (3) whether the plantiff has a right to a jury trial; and (4) whether uniform federal law applies. Carlson, 446 U.S. at 20-23. The two procedures that the government relies on only meet the last test. Neither the Board procedures nor Article 138 provides punitive damages, a jury trial, or full compensatory damages.

While the Board may award back pay in some instances, 10 U.S.C. § 1552(c), it can

do nothing to compensate for the more serious injuries suffered. A back pay award does not compensate an individual for the loss of four years of his life spent scrubbing kitchen stoves or toilets with a toothbrush when, for example, he was denied the opportunity to receive engineering or computer training for racial reasons.

The Board procedures have no deterrent effect on officers. While the Article 138 procedure might,[37/] its failings are that it

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37/ While Article 138 may have a deterrent effect in theory, historically, it has not served this purpose with regard to race discrimination. In contrast, a civil damage action with compensatory and punitive damages will more surely deter misconduct. Of course, to the extent that Article 138 is an effective deterrent, a Bivens remedy will have no greater "chilling" effect upon discipline. In any event, Article 138 cannot be said to be as effective as a Bivens remedy in light of the other aspects of the Carlson test.

is solely an internal remedy and that it provides none of the damages available in a Bivens action.

The irony of this case is that the plaintiffs here do not even have the FTCA or other civil remedies normally available.[38/] They are in a worse position than the prisoner in Carlson. According to the government, enlisted men, who willingly joined the armed forces to serve this country honorably, would have fewer rights than federal

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38/ As the Government points out, Brief for Petitioners at 38 n.8, Title VII of the Civil Rights Act of 1964 does not cover the military. See Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978). Thus, the plaintiff does not have Title VII as an alternative remedy. The fact that the military is not covered under Title VII does not affect the availability of a Bivens claim to servicemen. In Davis, a Bivens action was available to Ms. Davis even though employees of Congress were specifically exempted from Title VII.

prisoners who have broken the laws of our country. It would be a cruel step for this Court to declare that servicemen are entitled to less constitutional protection than prisoners.[39/]

CONCLUSION

Ignoring constitutional structure, congressional action, common law precedent, and recent case law, the government would have this Court legislate a new absolute immunity for military officers. The implications of such an immunity would be unprecedented. It would, for the first time,

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39/ The government's argument is short sighted. The effect of the rule it advocates will quickly filter through the ranks and affect efforts to recruit blacks into the Navy. But, then again, discouraging blacks is not a new approach for the Navy. See discussion, supra, 4-8, 9 n.9.

exempt the military from the constitutional process and leave servicemen without a realistic remedy for violations of clear-cut constitutional rights. And it would do so without enhancing military discipline or morale.

Adopting the broad Harlow immunity in the military context would, in contrast, provide sufficient protection for military needs while preserving the fundamental protections of the Constitution.

Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-167

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, ET AL.,
Petitioners,

v.

VERNON WALLACE, ET AL.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NAVAL RESERVE ASSOCIATION IN SUPPORT OF PETITIONERS

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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BRIEF OF *AMICUS CURIAE* NAVAL RESERVE ASSOCIATION IN SUPPORT OF PETITIONERS

The Naval Reserve Association, with the consent of the parties, submits this brief, *amicus curiae*, in support of reversal of the decision of the court of appeals below.

INTEREST OF THE *AMICUS CURIAE*

The Naval Reserve Association ("NRA") is a national organization consisting of approximately 23,000 members, most of whom are members of the United States Naval Reserve. The NRA is a national educational and professional organization of officers joined together to support the navy and to provide services to naval reserve officers. The NRA was established in 1954 in recognition

of the need of an organization devoted solely to service to the navy, naval reserve, and naval reserve officers.

The major objective of the NRA is to cooperate with the naval establishment in the solution of the many and complex problems which necessarily arise in the administration of a navy composed of both regular career and reserve personnel. The association supports the navy in performing its role in the national defense of the United States and measures the success of its actions by the yardstick of patriotism rather than self-interest.

In pursuit of its objectives, the association provides the Congress with its consolidated opinion on legislative matters, and provides the Department of the Navy and Department of Defense with its opinion on defense matters. The NRA also supports local reserve commands in the accomplishment of training programs and supports the Naval Reserve Officer Training Corps program in colleges throughout the country.

The NRA and its members have a clear interest in whether this Court will permit servicemen to hold their military superiors personally liable in money damages for violations of constitutional rights. Members of the NRA are subject to being called to active duty, and many attend weekly drills and active duty training sessions each year. At all times, the rules, regulations, procedures and laws that affect those on active duty also affect those in the Naval Reserve. The NRA and its members are therefore intimately affected by the outcome of this matter.

SUMMARY OF ARGUMENT

Presented for decision is a case in which the important goals of adequate protection of individual constitutional rights and preservation of an effective, efficient national

defense are potentially at odds. The plaintiffs are members of the armed forces. The defendants are their military superiors, either senior enlisted men or officers. By this action the plaintiffs assert the right to hold their military superiors individually liable in damages for alleged violations of their equal protection rights under the Fifth Amendment to the United States Constitution. Specifically, the plaintiffs allege that solely because of their race, they were assigned the least desirable duties, excluded from training programs, given low performance evaluations, and punished with unusual severity for minor transgressions.

The precedential basis of plaintiffs' claims is rooted in this Court's decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which this Court held that, under appropriate circumstances, an action for damages would lie against individuals, who, under color of federal authority, violated the plaintiffs' constitutional rights. Since then the existence and extent of this remedy's availability has sharply divided the Court. Nonetheless, the cases are in agreement that, at a minimum, where Congress has provided a substitute remedial framework, and where special factors counsel hesitation, the remedy should not be permitted. *See Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228 (1979); *Butz* v. *Economou*, 438 U.S. 478 (1978).

The decision of the court of appeals below unnecessarily set in conflict the legitimate interests of the military in the integrity of its chain of command with the remedial framework for servicemen whose constitutional rights have been infringed by their superiors. It ignored altogether the substantial question of whether a damage action against military superiors ought to be available to

servicemen in a *Bivens* context. Instead, it assumed the existence of such a right, and held that if administrative remedies are exhausted by the plaintiff, and if the subject matter of the suit was amenable to judicial review, the only issue remaining was the extent of immunity, if any, available to the military superiors.

The decision of the court below relegates to secondary status the importance of the remedial measures deemed appropriate by Congress and the executive long before the advent of *Bivens*. The remedial measures in place provide a broad-ranging framework within which a serviceman may seek redress for wrongs committed by his military superiors.

By necessity, a military commander's authority over subordinates is extensive. To guard against the potential for abuse of that authority, and at the same time bolster the efficacy of the military chain of command, a comprehensive remedial system was devised whereby the armed forces themselves are empowered to provide any remedy necessary to correct an injustice. This remedial framework recognizes the importance of guaranteeing the lawful and proper treatment of service members. At the same time it enhances their willingness to support the decisions of command by insuring that the miscreant superior's wrongdoing will be remedied, in turn, by his own superiors. Further, a denial of the available remedies by the services is frequently subject to judicial review, thus guaranteeing that, when all else fails, resort to the courts will not be denied. *U.S. ex rel. Berry* v. *Commanding General*, 411 F.2d 822, 825 (5th Cir. 1969); *Casey* v. *Schlesinger*, 382 F.Supp. 1218 (N.D. Ok. 1974); *Baxter* v. *Claytor*, 652 F.2d 181 (D.C. Cir. 1981).

The carefully drawn remedies established by Congress and the executive, essential to the proper functioning of our military forces, has been subverted by the decision of the court of appeals below. By subjecting military commanders to the substantial expenditure of time and their personal funds in defending such suits, along with the inescapable fear of being held liable in damages, the legitimate decisions of military commanders cannot help but be tempered. Further, the potentiality for abuse of the judicial system by the disgruntled service members cannot be ignored. Cognizant of his ability to force his superiors to justify their decisions in court, a serviceman's respect for, and adherence to, legitimate military orders could not help but be lessened.

The decision of the United States Court of Appeals for the Ninth Circuit emasculates the constraints placed upon the implication of a damages remedy against officials for constitutional violations. The decisions of this Court properly limit the availability of such actions to situations in which an alternative remedial framework has not been established or where legitimate governmental concerns will not be thwarted if such a remedy is permitted. Both of those factors weigh against the implication of a *Bivens* remedy under the circumstances of this case.

ARGUMENT

I

WHERE A SUBSTITUTE, ADEQUATE REMEDIAL FRAMEWORK IS AVAILABLE OR WHERE SPECIAL FACTORS COUNSEL HESITATION, A *BIVENS* REMEDY SHOULD NOT BE IMPLIED.

In the now-famous case of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court created a right of suit for damages

against individual federal officials whose actions exceed the bounds of constitutional constraints upon the government. The defendants in that case were federal narcotics agents alleged to have violated the plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures. In deciding the case the Court looked to determine the power of the federal courts to grant a damages remedy against the individual govermental official under the circumstances. It concluded that where the subject matter of the suit was within the general jurisdiction of the federal courts, as was the Fourth Amendment, "federal courts may use any available remedy to make good the wrong done." *Id.* at 396 [citation omitted]. Nonetheless, while the damages remedy was made available under those circumstances, the decision stopped far short of ruling that it would be made available whenever anyone alleged a violation of his constitutional rights by a federal official.

Specifically, the Court extensively discussed the absence of any effective, alternative remedy available to the plaintiff. "For people in Bivens' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring). Further, the Court noted that the case involved "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. It is under those circumstances, and those constraints, that the Court determined the appropriateness of according the damages remedy sought.

These same factors, variously articulated, have been the framework within which this Court has made the "principled choices among traditional judicial remedies" necessary when confronted with a violation of an individual's constitutional rights. *Id.* at fn. 8 (Harlan, J., concurring). Thus, in *Butz* v. *Economou*, 438 U.S. 478,

513-15 (1978), it was held that the importance of preserving the independent judgment of administrative law judges and prosecutors accorded them absolute immunity from damages liability, particularly in view of the existing, adequate remedial framework available to a defendant in an administrative proceeding.[1] Similarly, in *Davis* v. *Passman*, 422 U.S. 228, 245 (1979), the Court adopted wholecloth the same considerations in determining the availability of a damages remedy in favor of a female congressional administrative assistant who claimed she was terminated from employment on account of her sex in violation of the Fifth Amendment. In reaching its conclusion in that case, the Court extensively discussed the unavailability of any other remedy should the claim be denied, and noted the absence of any special concerns counselling hesitation in employing the remedy. Finally, these same determinants of the availability of a damages action against individual federal officials received express attention in *Carlson* v. *Green*, 446 U.S. 14 (1980). There the court held that the availability of a damages remedy against a federal official for violations of constitutional rights was conditioned upon the absence of special factors

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[1] The *Butz* Court analyzed the issue under the rubric of the availability of an absolute immunity in favor of the governmental officials. The distinction is largely procedural. If the absence of "special factors" and the absence of an alternative remedy are preconditions to the existence of a claim for damages, the burden is on the plaintiff to establish their absence. If, instead, they are elements of the affirmative defense of absolute immunity, the burden is on the defendant. In any event, under the circumstances of this case, where both the alternative remedies and the "special factors" are proper subjects of judicial notice under Rule 201, Fed. R. Evid., the distinction is largely academic.

counselling hesitation in according such a right, and the absence of a substitute remedy for recovery directly under the Constitution.

In the context of suits by servicemen against their military superiors, the considerations addressed by this Court in its previous decisions dictate a denial of a *Bivens* remedy. An express, and necessarily exclusive, remedial framework has been provided to servicemen to redress wrongs by their superiors, including wrongs of constitutional dimensions. This, coupled with the clear need of our armed forces to maintain effective discipline and respect for military superiors, militates strongly against the availability of a *Bivens* action by a serviceman against his military superiors. It is to these points that this argument now turns.

II
THE EXISTING REMEDIES AVAILABLE TO SERVICEMEN ARE EXCLUSIVE.

Long before the advent of the *Bivens* remedy, Congress adopted the remedial measures it deemed appropriate for wrongful acts by military superiors against their subordinates. The remedies provided are both consistent with the maintenance of military discipline and adequate to provide the needed protection to members of the armed forces. Additionally, the legislatively enacted remedies have been supplemented by an entire panoply of administrative remedies established by the Departments of Defense and the Navy to compliment the statutory remedies. Further, since the advent of *Bivens*, Congress has faced, and expressly rejected, the opportunity to adopt further remedies. These facts compel the conclusion that Congress intended the existing remedial framework to be exclusive. Accordingly, the implication of a *Bivens* remedy is inappropriate.

In 1950, Congress enacted Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938. That statute provides that "any member of the armed forces who believes himself wronged by his commanding officer" may file a complaint with superior military authorities who are then directed to "examine into the complaint and take proper measures for redressing the wrong complained of." The power of the services to take any necessary measures to correct a wrongful act by a commanding officer is virtually plenary under this section.

The use of Article 138 to correct the specific wrongs complained of by the present plaintiffs is expressly authorized. The United States Navy Equal Opportunity Manual, OPNAV Instruction 5354.1A, lists the Article 138 complaint of wrongs as one of the measures by which a member of the armed forces may seek redress for discriminatory acts. Furthermore, Appendix A to Chapter 4 of the instruction directs commanders to inform an individual complaining of unlawful discrimination of his right to initiate a complaint under Article 138 if the results of the commander's investigation pursuant to the instruction are deemed unsatisfactory by the complainant.

The proceedings under Article 138 are subject to review up the chain of command to the Secretary of the Navy. They have frequently been reviewed by the federal courts when a remedy has been arbitrarily denied. *Adkins* v. *U.S. Navy*, 507 F.Supp. 891, 898 (S.D. Texas 1981); *Casey* v. *Schlesinger*, 382 F.Supp. 1218, 1219 (N.D. Ok. 1974); *Smith* v. *Resor*, 406 F.2d 141, 147 (2d Cir. 1969); *United States ex rel. Berry* v. *Commanding General*, 411 F.2d 1822, 825 (5th Cir. 1969).

The procedures for redress of discrimination complaints permitted by Article 138 date back to the Articles of War, adopted in 1920 as 10 U.S.C. § 1593. They have

remained in force since that time and, even alone, would provide adequate protection of individuals' constitutional rights.

Despite the broad relief available under Article 138, it is but one part of an entire remedial network available to the service member to redress grievances, including those of discrimination under the Fifth Amendment to the United States Constitution. The Board for Correction of Naval Records, established by 10 U.S.C. § 1552, has unlimited powers to correct any military record where necessary to "correct an error or remove an injustice." *Id.* The Board consists of civilian employees of the executive who hold hearings to consider the requests of service members for redress. The statute was enacted in 1956; however, similar provisions have been in effect since 1951. The power of the Board for Correction of Naval Records to remedy wrongs is expansive. Virtually all of the claims presented by the plaintiffs in this case are capable of remedy by resort to the Board. Thus, the Board may correct a service member's record to reflect a promotion unjustly denied, and may even provide back pay, *Caddington* v. *U.S.*, 178 F.Supp. 604, 147 Ct. Cl. 629 (1959); *Gearinger* v. *U.S.*, 412 F.2d 862, 188 Ct. Cl. 512 (1969); *Skinner* v. *U.S.*, 594 F.2d 824 (1979); may correct unjustly disfavorable performance evaluations, *Guy* v. *U.S.*, 608 F.2d 867 (1979); and may even remove all record of an unjustly imposed punishment, *Baxter* v. *Claytor*, 652 F.2d 181 (D.C. Cir. 1981); *Davies* v. *Resor*, 455 F.2d 1331 (1st Cir. 1971). Furthermore, as with proceedings under Article 138 of the Uniform Code of Military Justice, the proceedings of the Board for Correction of Naval Records are reviewable by the courts. *Horn* v. *Schlesinger*, 514 F.2d 549 (8th Cir. 1975); *Storey* v. *U.S.*, 531 F.2d 985, 209 Ct. Cl. 174 (1976).

Under § 1106 of the U.S. Navy Regulations, a service member may submit a complaint, parallel in the scope and effectiveness to that provided under Article 138 of the Uniform Code of Military Justice, complaining of any wrongful act on the part of any other member of the military. Complementary to Article 138, this provision permits an aggrieved service member to complain of any superior's conduct, not just his commanding officer's.

Part of the plaintiff's claims in this case concerns the administration of unusually severe punishment for minor offenses. Such punishment is imposed pursuant to Article 15 of the Uniform Code of Military Justice, 10 U.S.C. § 815. Subsection (e) of that section provides that any person punished unjustly, or in a manner disproportionate to the offense, may appeal the imposition of punishment up the chain of command. Furthermore, punishments imposed under this section are reviewable by the Board for Correction of Naval Records, as discussed above.

Finally, a commander who violates his subordinates' constitutional rights is subject to severe disciplinary measures. Under Article 92 of the Uniform Code of Military Justice, a member who violates the orders of superior authority, including standing orders prohibiting the commission of discriminatory acts, may be punished by courts-martial. 10 U.S.C. § 892. This same conduct is proscribed by Article 93, which prohibits the maltreatment of any subordinate. 10 U.S.C. § 893. These measures provide appropriate and adequate deterrents, while at the same time rendering the commander accountable to his superiors. Thus, the desired result is achieved within the proper framework of military discipline.

Each of these remedial devices was enacted by Congress prior to the *Bivens* decision. Had Congress desired,

it could have provided a direct action against the offending superior to insure the protection of the serviceman's rights. For obvious reasons, it was deemed inappropriate to do so.

More importantly, each of these remedial measures adequately protects the service member's rights in a manner which supports, rather than subverts, the chain of military authority. It is well recognized that military superiors possess wide authority over their subordinates. Having imbued these superiors with such authority, it was right and proper that Congress, at the same time, provide remedial mechanisms whereby the armed forces assume responsibility for abuses of the authority it had granted. The procedures outlined above do precisely that. They support the chain of command because they provide for the correction of wrongs by the superiors of the offending official. These individuals are in a prime position to take effective action, are knowledgeable of the structure of the armed forces, and possess a unique interest in insuring that servicemen's rights are adequately protected. These long-standing mechanisms *are* the remedy provided by Congress. They should not be lightly cast aside, nor circumvented by the implication of an unneeded and unwarranted right to pursue individuals for claims of damages.

III
THE NINTH CIRCUIT'S DECISION INADEQUATELY ACCOUNTS FOR THE UNIQUE NEEDS OF THE ARMED FORCES.

The decision of the court of appeals below considered the impact of their decision permitting service members to hold their military superiors personally liable in damages as a factor bearing upon, the "reviewability" of the case, and the degree of immunity to be accorded the de-

fendant. The consequence of this approach was to downplay the significance of military considerations in reaching an appropriate decision.

The proper framework for analysis is to consider whether the impact of implying a *Bivens* remedy in favor of military subordinates against their superiors is a special factor which counsels hesitation in according such a right. The Ninth Circuit's characterization of the issue as a determinant of reviewability posed the wrong question. Reviewability, as a judicial doctrine, is principally an analysis of the ability of the courts to competently determine the issue confronting them. *Baker* v. *Carr*, 369 U.S. 186 (1962). While the courts may well be competent to determine many issues involving alleged violations of the constitutional rights of service members by their superiors, it may nonetheless be inadvisable for the courts to do so because of the impact of such decisions upon the disciplinary framework of the military.[2]

Similarly, the Ninth Circuit's analysis of what it termed the "immunity" of the military superior was inadequate. The court held that "[o]nce a claim has been found reviewable, allowing a damages remedy would not exacerbate either the disruption or the usurpation [of military functions]." *Wallace* v. *Chappell*, 661 F.2d 729, at n.9 (9th Cir. 1981). Thus, it considered that the reviewability question was determinative of the availability

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[2] This is not to say that reviewability is not a factor to be considered in any claim involving military decisions. As the court below properly noted, claims involving the exercise of military discretion or expertise may well be incapable of adequate determination by a court of law. Such factors may well limit the ability of the court to adequately decide a given claim regardless of the basis for suit.

of a damages remedy. The only exceptions acknowledged by the court below "might relate to military officials who perform functions analogous to those of judges and prosecutors," and "decisions made in a combat setting." *Id.* at n.10.

The court concluded that only a qualified immunity was warranted. In addition to the fact that the court adopted an improper standard in arriving at the determination, it cannot escape notice that the according of a qualified immunity in the context of an equal protection claim was a meaningless gesture. The Fifth Amendment protects only against arbitrary or invidious discrimination. *Jefferson* v. *Hackney*, 406 U.S. 535 (1972). Consequently, for the plaintiff to make out his claim, he must establish the bad faith of the defendant. To say, as did the court below, that the defendant military superiors would be adequately protected by according them an affirmative defense of qualified immunity is pointless in this context.

Furthermore, the Ninth Circuit's conclusion that the courts would be perfectly capable of dealing with nonmeritorious claims through the device of the motion for summary judgment is, at best, suspect. The state of mind of the defendant is always an element in a suit claiming a violation of an individual's equal protection rights. Under these circumstances, summary judgment will rarely be appropriate since a factual issue will almost always exist. *Imbler* v. *Pachtman*, 424 U.S. 409, 419 n.13 (1976). Consequently, the decision of the Ninth Circuit below will, in most instances, force military superiors to defend through trial any allegations of their subordinates which can be framed in a constitutional context.

The military decisions before the court today involve matters of assignments and discipline which must be made by military commanders on a day-to-day basis. The

disturbing impact of the Ninth Circuit's decision is the adverse effect on military decisions that is inescapable in the face of the consequences to the individual commander should a serviceman suspect improper motives in arriving at a decision. The commander ordering unpleasant or hazardous duty assignments, conducting simple inspections or imposing military discipline could not help but be hesitant in the face of the prospect of having to personally defend against, and possibly pay damages to, the disgruntled serviceman. Further, those same disgruntled service members would feel freer to second guess their superiors' commands knowing that they could force them to justify military decisions in court. The service members' respect for, and adherence to, legitimate military orders could not help but be lessened. These prospects pose serious disruption upon military discipline and a concomitant dimunition of our national security.

This Court has long recognized the importance of military discipline and the military chain of command to the defense of the United States. The best known of the cases is *Feres* v. *United States*, 340 U.S. 135 (1950). There the Court decided that the Federal Tort Claims Act did not permit suits by military members arising out of, or incident to, military service. The basis for the *Feres* doctrine is the "peculiar relationship of the soldier to his superior" and "the extreme results that might obtain" on military discipline should intra-military tort litigation be permitted. *United States* v. *Brown*, 348 U.S. 110, 112 (1954). *See also, United States* v. *Muniz*, 374 U.S. 150, 162 (1967); *Stencel Aero Engineering Group* v. *United States*, 431 U.S. 666, 671-672 (1977). These same considerations have permeated virtually every decision

rendered by this Court concerning the conduct of business by the military.

> No question can be left open as to the right to command in the officer or the duty of obedience in the soldier.

In re Grimley, 137 U.S. 147, 153 (1890).

Whether or not the courts have chosen to accord review to a given issue involving military matters, it is clear that the impact of such questions has been of paramount concern in the decision-making process. In the context of the personal liability of individual commanders, these considerations must, at a minimum, be considered "special factors counselling hesitation." *Carlson* v. *Green*, 446 U.S. 14, 18 (1980). It is quite apparent that these factors counselled hesitation in the remedies accorded by Congress to aggrieved service members. None of those remedies included the availability of an individual suit against the offending service member, and the adoption of a remedial framework supportive of the military chain of authority indicates a Congressional desire to effectuate that end. In the face of these constraints, this Court should not accord the remedies sought. Congress has spoken. It has placed on paper the remedies it deems appropriate in the face of the special concerns this Court has recognized as a limitation on the availability of a direct suit under the Constitution for damages against an offending official. The wisdom of Congress should not be second-guessed.

CONCLUSION

For each of the foregoing reasons, *amicus curiae* Naval Reserve Association urges that this Court reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
DEC 16 1982
TEVAS.
CLERK

No. 82-167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, *et al.*,
Petitioners,

v.

VERNON WALLACE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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December 16, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a national non-profit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising national security and defense issues as well as employment discrimination matters.

Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in cases such as *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); and *General Building Contractors Assoc., Inc. v. Commonwealth of Pennsylvania*, 102 S.Ct. 3368 (1982). More significantly, WLF has litigated cases involving national security issues such as *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied* 436 U.S. 907 (1978), and *Goldwater v. Carter*, 444 U.S. 996 (1979). The Foundation has also represented Senators and Congressmen before this Court in opposing the compulsory registration of women for the draft, *Rostker v. Goldberg*, 453 U.S. 57 (1980).

WLF believes that it can bring to this controversy a perspective not presently represented which will assist this Court in obtaining a full consideration of all relevant issue. The present parties to this suit are primarily concerned with its end results, *i.e.*, whether respondents may sue and recover $10 million in punitive and compensatory damages from petitioners for alleged constitutional violations. WLF, however, is concerned with the broader public interest issues, such as the effect such suits will have on discipline within the armed forces.

The Court of Appeals for the Ninth Circuit presently holds that servicemen may sue their superior officers in federal court for alleged constitutional violations incident to their military service. The Foundation believes that this decision is an unwarranted extension of *Bivens* which ignores past decisions of this Court dealing with military affairs and which will have an adverse impact on the ability of our armed forces to carry out their mission. For these reasons, WLF seeks to advance the interests of its members and the public at large by urging this Court to reverse the decision of the court below.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the recitation of facts as presented by the Court of Appeals for the Ninth Circuit in *Wallace v. Chappell*, 661 F.2d 729, 730-31 (1981). However, in order for the constitutional issues presented by this case to be properly decided, *amicus* wishes to stress the following.

Respondents, 5 Black Americans, voluntarily enlisted in the United States Navy. While still on active duty, they brought the present race discrimination action against their superior officers. They claim, *inter alia*, that their personal dissatisfaction with duty assignments, work loads, discretionary promotions, and training opportunities on board the U.S.S. Decatur constitutes an alleged violation of their constitutional right to equal protection under the Fifth Amendment to the United States Constitution.

Respondents are seeking $10 million in compensatory and punitive damages against their superiors directly. The United States is *not* a party to the present action.

SUMMARY OF ARGUMENT

The Washington Legal Foundation submits that the Court of Appeals for the Ninth Circuit seriously erred in holding that servicemen now have the right, under *Bivens* and its progeny, to sue their superior officers directly for damages for alleged constitutional violations arising out of their military service. The Foundation further argues that if *Bivens* is applicable here, then absolute immunity rather than qualified immunity is appropriate.

The reasoning of the court below not only ignores past decisions of this Court dealing with military affairs but also fails to consider fully what the practical consequences of its novel decision will be. Permitting

a serviceman to sue his superior officers can only result in a gradual breakdown in military discipline and the progressive enfeeblement of our armed services and, hence, our national defense. Equally important, the Ninth Circuit's decision will have the undesirable effect of opening the courts of the United States to approximately 2 million enlisted servicemen and women to sue their superiors, at a time when the overloaded judicial system is already perceived by many as nearing the point of complete collapse. Finally, the lower court's decision constitutes yet another example of an unrestrained judicial invasion of the legislative sphere of authority despite the fact that Congress has provided ample administrative remedies in the chain of command for redress of servicemen's grievances.

For these reasons, *amicus* submits that the decision is contrary to law and not in the public interest, and should be summarily reversed.

ARGUMENT

I. *BIVENS* SHOULD NOT BE EXTENDED IN THE MILITARY CONTEXT.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 338 (1971), this Court in an unprecedented decision held that victims of a constitutional violation by a federal agent have a right to recover damages against the official personally in federal court despite the absence of any statute conferring such a right.[1] This Court allowed, however, that the presumption of the existence of such a judicially-created, constitutional cause of action could be defeated in two ways. The first would be when defend-

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[1] *Amicus* believes that "*Bivens* is a decision 'by a closely divided court, unsupported by the confirmation of time', and, as a result of its weak precedential and doctrinal foundation," it should be either reversed or strictly limited to its facts. *See Carlson v. Green*, 446 U.S. 14, 32 (1979) (Rehnquist, J., dissenting), *quoting Kovacs v. Cooper*, 336 U.S. 77, 89 (1949).

ants were able to demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. The second would be when defendants were able to show that Congress has provided an alternative remedy. *Id.* at 397.

A. "Special Factors" Exist In The Military Context Which Require That Constitutional Protections Be Applied Differently.

It is clear that, in the instant case, "special factors" are indeed raised by the fact that military officers are being sued by their subordinates for alleged constitutional violations arising out of disciplinary and personnel measures. Numerous cases have been decided by the Supreme Court which recognize the necessary differences between military and civilian life. *See, e.g., Greer v. Spock*, 424 U.S. 828 (1976); *Parker v. Levy*, 417 U.S. 733 (1974); *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974); *Toth v. Quarles*, 350 U.S. 11 (1955). While *amicus* recognizes that civilians are not stripped of all constitutional protections once they enter into the armed services, it is self-evident, and past case law stresses, that "the different character of the military community and of the military mission require a different application of these [constitutional] protections. The fundamental necessity for obedience, and the consequence necessity for the imposition of discipline may render impermissible within the military that which would be constitutionally impermissible outside of it." *Parker v. Levy, supra*, 417 U.S. at 758. *See also, Committee for GI Rights v. Callaway*, 518 F.2d 466, 474 (D.C. Cir. 1975) (denying claim that warrantless drug inspections by the U.S. Army in Europe were unreasonable and constitutionally impermissible under the Fourth Amendment).

The common sense expectation of differences in the nature of military and civilian life is such that in the past, this Court has not hesitated to deny judicial relief in the military context. Thus, in *Feres v. United States* 340

U.S. 135 (1950), a unanimous Court went so far as to reject the plain language of Federal Tort Claims Act in order to disallow suits by servicemen against the United States for service-related injuries. In rejecting claims under the FTCA, the Court was influenced by sound policy considerations, namely, the very real possibility that military discipline would become disrupted by these suits and that such a judicially sanctioned disruption in discipline could lead to the disintegration of our armed forces. As Chief Justice Warren later reflected:

> In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors'; the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders or negligent acts committed in the course of military duty.

United States v. Muniz, 374 U.S. 150, 162 (1963), *citing United States v. Brown*, 348 U.S. 110, 112 (1954). *See also Stencel Engineering Corp. v. United States*, 431 U.S. 666, 671-672 (1976).

Given this Court's justifiable fear of the "dire consequences" that would result if servicemen were allowed to sue on negligent claims arising out of "[a] battle commander's poor judgment, an army surgeon's slip of hand, or a defective jeep which causes injury," *Brooks v. United States*, 337 U.S. 47, 52 (1949), *a fortiori*, the Ninth Circuit should have exercised extreme caution in deciding whether or not servicemen may sue their superior officers, especially for conduct relating to the very essence of military functions, *i.e.*, duty assignment, discipline, and the like. Instead, the lower court relied on *Bivens* to find that respondents' claims were reviewable, and bootstrapped from this questionable premise to find that "the rationales favoring reviewability . . . likewise favor allowing recovery of money damages." *Wallace v. Chappell*, 661 F.2d 729, 735 (1981).

B. Alternative Congressional Remedies Exist Which Safeguard The Constitutional Rights Of Servicemen.

Even assuming, *arguendo*, that no such "special factors" exist, the fact that Congress has provided adequate remedies for redress of respondents' grievances should have been sufficient to prevent the Ninth Circuit from extending *Bivens*.[2] In the instant case, adequate alternative Congressional remedies exist which were specifically enacted in order to safeguard the constitutional rights of servicemen but, at the same time, would *not* disrupt military discipline or morale.

For example, 10 U.S.C. § 938 provides that:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

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[2] There is at present much dispute over whether the alternative remedy that Congress has provided and which defeats a *Bivens* action must be explicitly declared by the Congress to be a *substitute* for recovery under the Constitution or whether it is enough that the alternative remedy exists without any such explicit declaration on the part of Congress, *See Carlson v. Green*, 446 U.S. 14, 26-27 (Powell, J., concurring). In the opinion of *amicus*, if such actions are to be allowed they should be as strictly limited as possible. Accordingly, the Foundation adopts the position of Justice Powell that no explicit declaration on the part of Congress is necessary as long as an alternative remedy exists. Such a position is in line with "the Court's longstanding recognition that Congress is ultimately the appropriate body to create federal remedies." *Id.*

Thus, by statute, Congress has provided a mechanism for the redress of *any* serviceman's grievances and has done so, moreover, in a way which preserves the military chain of command.

In addition, 10 U.S.C. § 815(e) allows any servicemen who complains of discriminatory nonjudicial punishment because he "considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority." Likewise with the enactment of 10 U.S.C. § 1552 Congress has provided a forum, *viz.*, Correction Boards, for servicemen to challenge allegedly discriminatory performance evaluations or promotion decisions. Under 10 U.S.C. § 1552 the Secretary of a military department and his Boards have also been vested with the authority to determine, insofar as is possible, the true nature of alleged injustices to any member of the military and to take steps to grant thorough and fitting relief. *See Duhon v. United States*, 461 F.2d 1278 (Ct. Cl. 1978); *Yee v. United States*, 512 F.2d 1383 (Ct. Cl. 1975).

II. ASSUMING, *ARGUENDO*, A *BIVENS* ACTION EXISTS, IT IS IMPERATIVE THAT MILITARY OFFICERS BE GRANTED ABSOLUTE IMMUNITY FROM SUIT.

After determining that a *Bivens* action existed against petitioners, the lower court held that whether or not petitioners could be found liable for monetary damages would depend upon four factors:

> (1) The nature and strength of the plaintiff's claim * * *. (2) The potential injury to the plaintiff if review is refused. (3) The extent of interference with military functions[,] * * * [although] interference per se should not preclude review because some degree of interference will always exist. (4) The extent to which military discretion or expertise is involved.

661 F.2d at 733.

These four factors, derived from *Mindes v. Seaman*, 453 F.2d 197, 201-202 (5th Cir. 1971), were thus used by the Ninth Circuit to fashion a "qualified immunity" for all military officers. As has already been pointed out by one member of this Court, however, this type of qualified immunity, which is dependent upon whether the military officer in question can prove that he acted in good faith, "badly misses the mark." *Economou v. Butz*, 438 U.S. 478, 520 (1978) (Rehnquist, J. dissenting.) Since the officer will not know until inquiry at trial whether or not immunity will be recognized by the court, granting him a qualified immunity will have the obvious effect of impairing his ability to make decisions, issue orders, or impose what he considers to be necessary disciplinary punishment. In short, qualified immunity "is no immunity at all." *Id.*

In curious fashion, the lower court does concede that certain situations may exist where granting military officers absolute immunity would be essential. "Possible exceptions, for example, might relate to military officials who perform functions analogous to those of judges . . . [or] *when decisions are made in a combat setting.*" *Wallace, supra*, 661 F.2d at 736 fn.10, (emphasis added). However, to suggest that a neat distinction can be drawn between decisions made by military officers in a combat setting and decisions made by these same officers in the time immediately prior to actual engagement in hostilities sadly misperceives the reality of military life and what is required merely in order to preserve military discipline, and hence, the potential maximum fighting capabilities of our armed forces. Moreover, it blithely assumes that judges are able to arrogate to themselves the legislative prerogative of declaring when "hostilities" begin anyplace in the world for the purpose of granting either absolute or only a qualified immunity. For example, suppose an enlisted man sued his superior officer for alleged constitutional violations based upon disciplinary sanctions he had received while serving as a

military advisor in El Salvador, or if he were a Marine sent to Lebanon. Are "hostilities" or "combat" under way in these situations entitling his commanding officer to absolute immunity, or does he receive only a qualified immunity because no war has been declared by Congress? Such inquiries are wholly inappropriate for the judiciary to undertake. *See Crockett v. Reagan*, No. 81-1034 (D.D.C., Oct. 4, 1982) (dismissal of suit alleging violations of War Powers Act because court incapable of fact finding to determine status of "hostilities"). *See also Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge court), *aff'd without opinion*, 411 U.S. 921 (1973); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1073), *cert. denied*, 416 U.S. 936 (1974).

The Ninth Circuit would also grant absolute immunity to military officers who perform functions analogous to judges. However, the very nature of war and its incident activity require that all military officers be granted this same absolute immunity. The fundamental necessity for obedience and for imposition of discipline dictate that a military officer's immunity from suit be as absolute as it is with the judiciary.[3] Any lesser standard will only lead to extensive litigation on the part of servicemen such as respondents and a concommitant decline in discipline and morale which will place in jeopardy the continued effectiveness of our nation's armed forces.

The Ninth Circuit acknowledges in its decision that such non-disruptive intraservice remedies exist, *Wallace*, *supra*, 661 F.2d at 738 fn.11, but betrays not even the

[3] The district court judge in this case, the Honorable Leland Neilson, was a former Navy Commander. In granting petitioners' motion to dismiss the complaint for, *inter alia*, military immunity he was properly guided by his own experiences as an officer in the Navy. *Amicus* submits that the reasons favoring absolute immunity for judges, namely insulation from the sort of pressures that might exist when it comes time to make hard decisions in the absence of absolute immunity, apply with equal force to military officers as well.

slightest indication that it understands their reason for being. Instead, it would extend the holding of *Bivens* in order to substitute the federal judicial appellate process for the military chain of command.

III. THE NINTH CIRCUIT'S DECISION IS AN UNWISE JUDICIAL INTRUSION INTO THE LEGISLATIVE SPHERE OF AUTHORITY.

Just as the Ninth Circuit recognized and then ignored the special nature of the military and the alternative remedies provided for by Congress, so too it paid lip service to Congress' role in overseeing the armed forces before it proceeded to aggrandize its own role.

The Ninth Circuit correctly noted the general objection that this Court has raised against judges "running the army," *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953). In addition, it also took note of the indisputable fact that "under the Constitution, regulation of military affairs is within the special province of Congress rather than the courts. U.S. Const. art. I, § 8, cl. 14." *Wallace*, *supra* at 732. However, despite these prudential considerations, the lower court had little difficulty in holding that federal courts may now review the disciplinary decisions of military officers, and award money damages against them.

There are strong policy reasons which militate against having courts and juries second-guess the decisions of military officers. An officer's judgment to impose disciplinary sanctions on a serviceman is a prime example of the " 'complex, subtle, and professional decisions as to the composition, training, and control of a military force'." *Rostker v. Goldberg*, 453 U.S. 57, 65, *quoting Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Courts are ill-equipped to pass on such actions.

Additionally, "[a] plaintiff who seeks his remedy directly under the Constitution," as respondents have done here, "asks the federal courts to perform an essentially legislative task." *Carlson v. Green*, *supra*, 446 U.S. at 28. Given the primacy of Congress' role in the regulation of military affairs, the court's inability to handle the types of questions that would be raised in these suits, and the fact that the task is an essentially legislative one, the lower court should have affirmed the district court's opinion rather than extend *Bivens* beyond "the bounds of rational judicial decision-making." *Id.* at 29.

The decision below to allow servicemen to sue their superior officers is unwise in one final respect. At a time when the federal courts are already overburdened and when many individuals, including members of this Court, have spoken of the "breakdown" of the judicial system, it is incredible to say the least that the Ninth Circuit should have extended the principles of *Bivens* to the armed services. Such an unwarranted extension can only have the effect of dramatically increasing the number of frivolous or marginal constitutional suits that federal judges would be required to review.

CONCLUSION

The Washington Legal Foundation believes that the court below incorrectly held that servicemen may sue their superior officers under *Bivens*. To allow this decision to stand would be to sanction the disruption of our armed forces, the judicial usurpation of Congressional powers and an increasing work load being foisted upon our judicial system. For these reasons, the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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On the brief:

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December 16, 1982

No. 82-167-CFX
Status: GRANTED

Title: George C. Chappell, et al., Petitioners
v.
Vernon Wallace, et al.

Docketed:
July 30, 1982

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Murcko,John

Entry	Date	Note	Proceedings and Orders
1	May 20 1982		Application for extension of time to file petition and order granting same until July 16, 1982 (Rehnquist, May 24, 1982).
2	Jul 1 1982		Application for further extension of time to file petition and order granting same until July 30, 1982 (Rehnquist, July 2, 1982).
3	Jul 30 1982	G	Petition for writ of certiorari filed.
5	Aug 16 1982		Order extending time to file response to petition until October 3, 1982.
6	Sep 24 1982		Order further extending time to file response to petition until October 10, 1982.
7	Sep 24 1982		Further extension of time to file brief in opposition granted by Justice Rehnquist to October 10, 1982.
8	Oct 12 1982	G	Motion of respondents Vernon Wallace, et al. for leave to proceed in forma pauperis filed.
9	Oct 12 1982		Brief of respondents Vernon Wallace, et al. in opposition filed.
10	Oct 13 1982		DISTRIBUTED. October 29, 1982
11	Oct 27 1982	X	Reply brief of petitioner filed.
12	Nov 1 1982		Motion of respondents Vernon Wallace, et al. for leave to proceed in forma pauperis GRANTED.
13	Nov 1 1982		Petition GRANTED.
			**********
14	Nov 10 1982	G	Motion of respondents for appointment of counsel filed.
15	Dec 6 1982		Motion for appointment of counsel GRANTED and it is ordered that John Murcko, Esquire, of Oakland, California, is appointed to serve as counsel for the respondents in this case.
16	Dec 16 1982		Brief amicus curiae of Washington Legal Foundation filed.
18	Dec 16 1982		Order extending time to file brief of petitioner on the merits until December 30, 1982.
19	Dec 20 1982		Joint appendix filed.
20	Dec 30 1982		Brief amicus curiae of Naval Reserve Association filed.
21	Jan 4 1983		Brief of petitioner George C. Chappell, et al. filed.
23	Feb 3 1983		Order extending time to file brief of respondent on the merits until February 19, 1983.
24	Feb 7 1983		Brief amicus curiae of A.C.L.U. filed.
25	Feb 7 1983		Brief amicus curiae of Lawyers For Civil Rights Under Law filed.
26	Feb 10 1983		Brief amicus curiae of NAACP,Legal Defense & Educational Fund filed.
27	Feb 18 1983		Record filed.

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Entry	Date	Note	Proceedings and Orders
28	Feb 18 1983		Certified copy of original record & C.A. proceedings, 2 volumes, received.
29	Feb 17 1983		Order further extending time to file brief of respondent on the merits until February 25, 1983.
30	Feb 28 1983		Brief amicus curiae of Bill of Rights Foundation, Inc filed.
31	Mar 7 1983		Application for leave to file responcent's brief on the merits in excess of page limitations, anc order granting
32	Mar 7 1983		same by Rehnquist, J., Mar. 8, 1983, not to exceed 57 pages.
33	Feb 28 1983		Brief of respondent Vernon Wallace, et al. filed.
34	Mar 24 1983		SET FOR ARGUMENT. Tuesday, April 26, 1983. (4th case) 1 hour
35	Mar 24 1983		CIRCULATED.
36	Apr 15 1983	X	Reply brief of petitioner filed.
37	Apr 21 1983		Court of appeals briefs received.
38	Apr 26 1983		ARGUED.